OPINION OF ADVOCATE GENERAL MISCHO

delivered on 11 January 2001 [1]

1. The VAT & Duties Tribunal, London (United Kingdom) has to decide on a dispute between the United Kingdom tax authority, the Commissioners of Customs and Excise ('the Commissioners'), and a mail order company, Freemans plc ('Freemans'). It relates to the manner in which the taxable amount is to be determined in respect of part of Freemans' sales. That taxable amount is the basis on which Freemans' liability to value added tax ('VAT') must be calculated.

2. Freemans' sales system is based on the use of more than 900 000 agents to whom it sends its catalogue.

3. The agents order products illustrated in the catalogue, either for third parties or for their own account. They pay for the purchases in instalments over several weeks under a self-financed credit scheme established by Freemans.

4. As an inducement, Freemans credits each agent, in her account with Freemans, with an amount equal to 10% of each payment she has made.

5. The amount credited constitutes commission in the case of a purchase made for a third party and a discount in the case of the agent's own purchases.

6. At any time the agent may use the amount credited to her account. She can have it paid by cheque or post office giro or in the form of national lottery vouchers; it may also be used to reduce the outstanding balance which she owes to Freemans.

7. Each time an agent uses an amount credited to her as payment for the purchase of an article from the Freemans catalogue that payment in turn gives rise to a 10% discount on the purchase price, which is credited to the agent's account.

1 — Original language: French.

8. Pursuant to Article 27 of the 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[2] the United Kingdom introduced special measures for retailers which allowed them to calculate their output VAT by reference to the overall value of their supplies during each accounting period on the basis of 'daily gross takings', rather than by reference to the value of each individual supply.

9. Until 28 February 1997 the United Kingdom tax authority authorised retailers to calculate their daily gross takings according to 'the standard method of gross takings' (hereinafter 'the SMGT'), which was based on payments received during an accounting period.

10. With effect from 1 March 1997 the tax authority required the use of a new method of calculating gross takings ('the optional method of gross takings', hereinafter 'the OMGT'), which is based on the total amount charged by the retailer.

11. The dispute between Freemans and the Commissioners relates solely to the amounts credited by Freemans to its agents when they make purchases for their own account.

12. When the SMGT applied, those amounts, which for ease of reference I will refer to as the 'agent's own purchases discount' ('AOP discount'), could be deducted immediately by Freemans from its daily gross takings.

13. Since the introduction of the OMGT, Freemans should, according to the Commissioners, have amended its practice and have calculated its daily gross takings without deducting AOP discount unless and until the discount was withdrawn by the agent in cash or used against the purchase price of goods from Freemans.

14. It is common ground that Freemans did not do so. The Commissioners therefore issued a tax assessment and Freemans appealed against it to the VAT and Duties Tribunal.

15. Two conflicting submissions have been made to the VAT and Duties Tribunal. Freemans submits that the taxable amount in respect of goods supplied to an agent for her own use is the catalogue price of those

2 — OJ 1977 L 145, p. 1.

goods less the agent's own purchases discount, as Freemans is never in a contractual position whereby it is entitled to receive the full catalogue price from the agent.

16. The Commissioners contend that, on a proper construction of the agreement between Freemans and its agent, the consideration, within the meaning of Article 11A(1)(a) of the Sixth Directive, is the full purchase price of the goods, as set out in the catalogue, which the agent is contractually required to pay to Freemans.

17. In order to reach a decision on the issue, the VAT and Duties Tribunal has referred the following question to the Court of Justice for a preliminary ruling:

'What, on a proper construction of Article 11A and 11C of the Sixth Directive, is the taxable amount in respect of goods supplied by mail order from a catalogue to a customer for the customer's own use where the supplier in operating self-financed credit terms allows a discount from the catalogue price to the customer ("AOP discount") with the AOP discount being credited to the customer as and when instalment payments are made to the supplier (or use made of AOP discount in reducing or discharging an instalment payment) but where the AOP discount which has accrued on payments made is available for immediate withdrawal or use by the customer even though future instalment payments will be due from that customer?

Is the taxable amount:

(1) the full catalogue price of the goods sold to the customer less the AOP discount on that price; or

(2) the full catalogue price of the goods sold to the customer with a reduction as and when the AOP discount is credited to a customer; or

(3) the full catalogue price of the goods sold to the customer with a reduction as and when the AOP discount is withdrawn or used by a customer; or

(4) some other, and if so what, amount?'

18. The VAT and Duties Tribunal correctly considers that the answer to the dispute is to be found in Article 11 of the Sixth Directive, which deals solely with determination of the taxable amount.

19. Let me therefore set out the provisions of Article 11 over which Freemans and the Commissioners take issue.

Article 11 provides that:

'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:

...

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

...

C. *Miscellaneous provisions*

1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

...'

20. The first and third of the answers envisaged by the VAT and Duties Tribunal

correspond to the positions of Freemans and the Commissioners respectively, whereas the second, which neither of the parties defends but which Freemans would wish to see adopted if the Court of Justice were to reject the first answer, seems to be favoured by the VAT and Duties Tribunal.

21. The VAT and Duties Tribunal also envisages that none of the three answers may be correct in the light of the requirements of Article 11 of the Sixth Directive and that it may be necessary for the Court to adopt another approach rather than choose one of the specific answers suggested to it.

22. However, the latter course will be necessary only if, after examining the three different methods of determining the taxable amount envisaged by the VAT and Duties Tribunal, it were to be concluded that none of them is authorised by the provisions of Article 11.

23. I must therefore first examine the three approaches proposed by the VAT and Duties Tribunal. However, before beginning my examination, I should point out that the Court of Justice has already had to consider the problem of determining the taxable amount in the case of the supply of goods. It has extracted, both from the logic underlying the Community VAT scheme and from Article 11A(1)(a) of the Sixth Directive, the principles which apply in all circumstances to the determination of the taxable amount.

24. Thus it follows from the judgment in *Elida Gibbs* v *Commissioners of Customs and Excise*[3] that 'the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him' and that 'according to the Court's settled case-law, that consideration is the "subjective" value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria (... Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 16, and Case C-126/88 *Boots Company* v *Commissioners of Customs and Excise* [1990] ECR I-1235, paragraph 19).'

25. Those principles have never been called in question in the written and oral submissions to the Court. At issue is solely the question of how those principles should be applied in the present case.

26. *Freemans* submits that Article 11A(1)(a) itself can supply the answer to the national court's question, since the consideration obtained by it when it sup-

3 — Case C-317/94 *Gibbs* v *Commissioners of Customs and Excise* [1996] ECR I-5339, paragraphs 19 and 27.

plies goods to an agent for the agent's own use is equal to the catalogue price less the AOP discount which it allows to the agent.

27. It observes that 'consideration' should not be confused with the sum paid by the purchaser. It refers to the judgment in *Glawe*,[4] in which the Court held 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.'

28. Just as the taxable amount for an operator of gaming machines does not include the whole of the sums inserted by players into the machines, the taxable amount in respect of Freemans' sales should not include the part of the payments made by its agents which Freemans credits to them as and when they make those payments.

29. The consideration for the supply of goods to an agent can only be the amount which Freemans is legally entitled to retain in the light of its agreement to allow AOP discount equal to 10% of the catalogue price.

30. That line of argument, however interesting, does not seem to me to be the one which should be followed in the present case.

31. In its judgment in *Boots Company*, cited above,[5] the Court held that 'each time the question of classifying a specific item arises, it is first necessary to examine whether the item falls within one of the categories referred to in paragraphs 2 and 3 and it is only when the answer to that question is in the negative that reference must be made to the general concept in paragraph 1(a)' (paragraph 16).

32. In other words, before considering the *lex generalis* it must be examined whether the *lex specialis* may apply.

33. The sums in discussion in the present case are characterised by the VAT and Duties Tribunal as an agent's 'own purchases discount'. Contrary to Freemans' suggestion, but as the Commission proposes, it is therefore necessary to begin by examining whether that discount is to be regarded as a discount which Article 11A(3)(b) expressly excludes from the taxable amount or, possibly, as a price reduction after the supply takes place, within the meaning of Article 11C(1), which authorises only a reduction of the taxable amount 'accordingly' under conditions determined by the Member States. In

4 — Case C-38/93 *Glawe* [1994] ECR I-1679, paragraph 13.

5 — See point 24 above.

the case of the provisions adopted by the United Kingdom, that reduction is to be made *ex post facto*, at the moment when the AOP discount is remitted to the agent or used by her.

34. Does the AOP discount scheme applied by Freemans therefore fall within the scope of Article 11A(3)(b) or Article 11C(1)? The latter possibility must be ruled out immediately in the light of the judgment in *Elida Gibbs*, cited above.

35. In *Elida Gibbs* the Court held that Article 11C(1) is to be applied only where the price is reduced 'after the supply takes place' (paragraph 30).

36. Under the Freemans sales scheme, although the AOP discount is credited to the agent only as and when she makes her payments, the grant of that discount is agreed from the moment when the goods are delivered. It is part of the sales terms offered by Freemans and accepted by the agent when contractual relations are entered into.

37. Is it therefore a discount accounted for at the time of the supply, with the result that Article 11A(3)(b) is applicable?

38. The *United Kingdom Government* and the *Greek Government* submit that this is not the case, since the AOP discount is credited to the agent only as and when she makes the payments which she has agreed to make; the sales price, when the sale is concluded, is the catalogue price.

39. In support of that contention, reliance is placed on the judgment in *Boots Company*, cited above, in which the Court held that:

'"Discounts and rebates" which, according to Article 11A(3)(b) of the Sixth Directive, are not to be included in the taxable amount, constitute a reduction of the price at which an article is lawfully offered to the customer, since the seller agrees to forgo the sum represented by the rebate in order precisely to induce the customer to buy the article (paragraph 18).'

40. Those governments argue that under the Freemans sales system there is no question of a waiver of the right to collect part of the sales price, since it is specifically the receipt of those payments which is the condition of the grant of the AOP discount.

41. If the amounts which Freemans credits to her account as and when she makes her

payments are not immediately used by the agent in order to reduce her subsequent payments, Freemans will in fact receive the full catalogue price.

42. The agent will indeed have, in Freemans' account book, a credit equal to 10% of the amount which she has paid, but she will not actually benefit in concrete terms from the discount until Freemans has paid it to her in accordance with one of the methods referred to above or until she uses it to pay for a new purchase. However, such payment or use has an air of uncertainty, it being common ground that a not inconsiderable number of agents do not claim the discount to which their payments have entitled them.

43. According to those governments, until the discount has been credited and actually paid to the agent or used by her, there cannot be any question of a discount that has been accounted for. Even if the agent acts quickly, the time at which she will be able to use the discount will inevitably be after the time when buyer and seller actually enter into contractual relations.

44. The *Commission* submits that, in the light of the information given in the order for reference, the AOP discount is unquestionably a discount that has been 'accounted for' within the meaning of Article 11A(3)(b).

45. The term 'accounted for' should be interpreted in the sense of 'acquisition of a legal entitlement'. A discount must be considered to have been accounted for from the moment when the person to whom it has been allowed has a legal right to receive it.

46. From the moment when the agent enters into a contract with Freemans for the purchase of goods she has a right to have her account at Freemans credited with 10% of each sum which she pays. The AOP discount is credited when the payments are made, but the right to obtain it comes into being before those payments are made. The payments trigger the crediting of the discount to the agent's account, but do not create the right to the discount. The instalment payments by the agent and the inclusion of the discount, in instalments, in her account take place in the course of the performance of the sales contract as concluded upon delivery of the goods; there is no subsequent amendment of that contract.

47. In the Commission's view, to regard 'discount accounted for' (*ristourne acquise*) as meaning 'discount to which there is a legal entitlement', as suggested by the French language version of the Sixth Directive, is not inconsistent with the other language versions, including the English version.

48. That line of argument by the Commission has convinced me and I endorse it all

the more willingly because it is supported by other factors. First of all, there is the fact that, under the system whereby Freemans sells to its agents, the full catalogue price may well never be received by Freemans.

49. It has been explained to us that as soon as the agent has made her first payment she is credited with an amount equal to 10% of that payment and she may use that amount to reduce her next payment.

50. It cannot therefore be argued that the judgment in *Boots Company*, cited above, contradicts the Commission's argument. In agreeing to credit its agent with AOP discount, Freemans waives the right to collect the full catalogue price. In any event, the judgment in *Glawe*, cited above, clearly drew a distinction between what the seller collects and what he in fact receives, which alone constitutes the taxable amount.

51. Secondly, there is the fact that the actual payment of the discount to the agent or her use of it are of no legal relevance, it being undisputed that the discount entered in the agent's account in Freemans' books is in fact at her disposal, just like an amount entered in her bank account. What she does with it is entirely up to her.

52. It cannot be accepted that determination of the taxable amount can depend on the agent's entirely discretionary decision as to what she wishes to do with discount which she has definitely acquired.

53. Thirdly and lastly, it must be noted that the conclusion which I have reached in applying Article 11A(3)(b) to the AOP discount is wholly in keeping with the Court's interpretation of Article 11A(1)(a), according to which the consideration for a sale, that is to say, the taxable amount, is the subjective value received by the seller, and not an objective value, namely, in the present case, the value indicated in the Freemans catalogue.

54. Having thus reached the conclusion that, on a proper construction of Article 11 of the Sixth Directive, the first answer envisaged by the VAT and Duties Tribunal is the correct one, I have no need to consider the matter further. The correctness of that answer rules out any other answer.

Conclusion

55. Having completed my reasoning, I propose that the Court should answer the question submitted to it by the VAT and Duties Tribunal, London as follows:

Article 11A and 11C of the Sixth Council Directive 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, must be interpreted as meaning that the taxable amount in respect of goods supplied by mail order from a catalogue to a customer for the customer's own use, where the supplier in operating self-financed credit terms allows a discount from the catalogue price to the customer ('AOP discount') with the discount being credited to the customer as and when instalment payments are made to the supplier (or use made of the AOP discount in reducing or discharging an instalment payment) but where the AOP discount which has accrued on payments made is available for immediate withdrawal or use by the customer even though future instalments payments will be due from that customer, is the full catalogue price of the goods sold to the customer less the AOP discount on that price.