Case C-40/09

Astra Zeneca UK Ltd

v

Commissioners for Her Majesty's Revenue and Customs

(Reference for a preliminary ruling from the VAT and Duties Tribunal, Manchester)

(Sixth VAT Directive – Article 2(1) – Concept of the supply of services effected for consideration – Retail vouchers provided by an undertaking to its employees as part of their remuneration)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Taxable transactions – Supply of services for consideration

(Council Directive 77/388, Art. 2(1))

Article 2(1) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as meaning that the provision of a retail voucher by a company, which acquired that voucher at a price including value added tax, to its employees in exchange for their giving up part of their cash remuneration constitutes a supply of services effected for consideration within the meaning of that provision.

In fact, there is a direct link between the provision of those vouchers to the employees and the part of the cash remuneration which the employees must give up as consideration for that provision since, instead of receiving all their remuneration in cash, those who have chosen to receive such vouchers must give up part of that remuneration in exchange for those vouchers, that transaction resulting in a specific deduction from the fund of an employee who made that choice. Moreover, the employer actually receives consideration, expressed in money, for the provision of the retail vouchers, since it corresponds to a fraction of the cash remuneration of its employees. In addition, the burden of the value added tax on the provision of those vouchers is borne by the employees who receive the vouchers, since the deduction from their remuneration to which that provision gives rise includes the price of the vouchers and all the value added tax on them.

(see paras 29-32, 35, operative part)

JUDGMENT OF THE COURT (Third Chamber)

29 July 2010 (*)

(Sixth VAT Directive – Article 2(1) – Concept of the supply of services effected for consideration –

Retail vouchers provided by an undertaking to its employees as part of their remuneration)

In Case C?40/09,

REFERENCE for a preliminary ruling under Article 234 EC from the VAT and Duties Tribunal, Manchester (United Kingdom), made by decision of 16 January 2009, received at the Court on 29 January 2009, in the proceedings

Astra Zeneca UK Ltd

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, T. von Danwitz and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 11 March 2010,

after considering the observations submitted on behalf of:

– Astra Zeneca UK Ltd, by M. Conlon QC, and D. Southern, barrister, instructed by G. Salmond, solicitor,

– the United Kingdom Government, by H. Walker, acting as Agent, and by N. Pleming QC,

– the Greek Government, by K. Georgiadis and I. Bakopoulos and by V. Karra, acting as Agents,

– the European Commission, by R. Lyal and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 April 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2(1), Article 6(2), first subparagraph, heading (b), and Article 17(2) 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) ('the Sixth Directive').

2 The reference was submitted in the course of proceedings between Astra Zeneca UK Ltd ('Astra Zeneca') and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') regarding value added tax ('VAT') charged to that company on account of the provision of retail vouchers to its employees as part of their remuneration.

Legal context

3 Article 2(1) of the Sixth Directive provides:

‘The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’.

4 Article 4(1) and (2) of that directive is worded as follows:

‘1. “Taxable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.’

5 Under Article 5(1) of that directive:

‘“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.’

6 Article 6(1), first subparagraph, of that directive states:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.’

7 Article 17(2)(a) of the Sixth Directive, in the version resulting from Article 28f thereof, provides:

‘In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person’.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 Astra Zeneca is a company which carries on business in the pharmaceutical industry.

9 That company offers its employees, who are not taxable persons for the purpose of VAT, a remuneration package consisting of a fixed annual remuneration, known as the ‘Advantage Fund’ (‘the Fund’), consisting of an amount in cash and, as appropriate, benefits chosen beforehand by the employees, it being understood that each benefit chosen by an employee gives rise to a specific deduction from that employee’s Fund.

10 Among those benefits, Astra Zeneca offers its employees retail vouchers to be used in certain shops.

11 The vouchers are of a nominal value of GBP 10, but give rise to a deduction of a discounted amount (between GBP 9.25 and GBP 9.55) from the employees’ Fund.

12 Astra Zeneca completed its VAT returns on the basis that it was not required to charge

output VAT on the provision of the vouchers to its employees and that it was not entitled to deduct as input tax the VAT which it had paid in purchasing those vouchers.

13 However, Astra Zeneca subsequently claimed that, as the cost of acquiring those vouchers was a business overhead, it ought to be entitled to deduct the VAT resulting from that acquisition and not to charge output VAT on the provision of the vouchers at issue to its employees, on the ground that they were not provided for consideration.

14 Consequently, Astra Zeneca made protective claims from the Commissioners for reimbursement of the input VAT which it had incurred in respect of the acquisition of the retail vouchers.

15 In this connection, the Commissioners decided, first, that Astra Zeneca is not entitled to deduct the input VAT paid on the purchase of those vouchers, since it does not use them for the purposes of any taxable transactions.

16 Secondly, the Commissioners decided that, in the alternative, Astra Zeneca is entitled to deduct the input VAT paid in acquiring those retail vouchers, but that it is required to account for the VAT on the provision of those vouchers to its employees on the ground that either those vouchers are provided for consideration, since a deduction is made from the employee's Fund, or the vouchers in question are made available to the employees for purposes other than business purposes. In that latter case, since the value of the supply of services corresponds to the cost of providing the retail vouchers, Astra Zeneca is required to account for the output VAT on that amount.

17 Consequently, the Commissioners refused to grant Astra Zeneca's application for reimbursement and raised protective tax assessments for the output VAT owed if the retail vouchers are supplied for consideration by Astra Zeneca to its employees.

18 Astra Zeneca appealed against the Commissioners' decisions to the referring tribunal.

19 In those circumstances the VAT and Duties Tribunal, Manchester, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. In the circumstances of this case, where an employee is entitled under the terms of his or her contract of employment to opt to take part of his or her remuneration as a face value voucher, is Article 2(1) of the [Sixth Directive] … to be interpreted such that the provision of that voucher by the employer to the employee constitutes a supply of services for consideration?

2. If the answer to question 1 is no, is Article 6(2)(b) [of the Sixth Directive] to be interpreted as requiring the provision of the voucher by the employer to the employee in accordance with the contract of employment to be treated as a supply of services, in circumstances where the voucher is to be used by the employee for his or her private purposes?

3. If the provision of the voucher is neither a supply of services for consideration within the meaning of Article 2(1) [of the Sixth Directive] nor is to be treated as a supply of services under Article 6(2)(b) [thereof], is Article 17(2) [thereof] to be interpreted so as to permit the employer to recover the [VAT] it has incurred in purchasing and providing the voucher to the employee in accordance with the contract of employment in circumstances where the voucher is to be used by the employee for his or her private purposes?'

Consideration of the questions referred

The first question

20 By its first question, the referring court is asking, in essence, whether Article 2(1) of the Sixth Directive must be interpreted as meaning that the provision of a retail voucher by a company to its employees as part of their remuneration constitutes a supply of services effected for consideration.

21 It should be recalled that by including amongst the taxable transactions defined in Article 2 not only the importation of goods but also the supply of goods or services effected for consideration within the territory of a country and by defining 'taxable person' in Article 4(1) as any person who independently carries out an economic activity, whatever the purpose or results of that activity, the Sixth Directive attributes to VAT a very wide scope (Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 6; Case C?260/98 *Commission* v *Greece* [2000] ECR I?6537, paragraph 24; and Case C?154/08 *Commission* v *Spain* [2009] ECR I?0000, paragraph 87).

22 Economic activities are defined in Article 4(2) of the Sixth Directive as comprising all activities of producers, traders and persons supplying services (see *Commission* v *Netherlands*, paragraph 7; *Commission* v *Greece*, paragraph 25; and *Commission* v *Spain*, paragraph 88).

23 An analysis of those definitions shows that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see *Commission* v *Netherlands*, paragraph 8; *Commission* v *Greece*, paragraph 26; and *Commission* v *Spain*, paragraph 89).

24 Having regard to the wide scope of VAT, it must be held that a company such as Astra Zeneca, in so far as it provides retail vouchers to its employees in exchange for them giving up part of their cash remuneration, carries out an economic activity within the meaning of the Sixth Directive.

25 The retail vouchers at issue in the main proceedings enable the employees who receive them to purchase goods or services in specific shops, so that, as the Advocate General observed in point 31 of his Opinion, those vouchers confer a future right to goods or services that is as yet indeterminate as to its object.

26 Consequently, in so far as those vouchers do not immediately transfer the right to dispose of property, their provision constitutes, for VAT purposes, not a 'supply of goods' within the meaning of Article 5(1) of the Sixth Directive, but a 'supply of services' within the meaning of Article 6(1) of that directive, since, under Article 6(1), any transaction which does not constitute a supply of goods within the meaning of Article 5 is regarded as a supply of services.

27 As regards determining whether a supply of services such as that at issue in the main proceedings is effected for consideration, it is settled case-law that the concept of the 'supply of services effected for consideration' within the meaning of Article 2(1) of the Sixth Directive requires the existence of a direct link between the service provided and the consideration received (see Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs and Excise* [1988] ECR 1443, paragraph 12; Case C-258/95 *Fillibeck* v *Finanzamt Neustadt* [1997] ECR I-5577, paragraph 12; *Commission* v *Greece*, paragraph 29; and *Commission* v *Spain*, paragraph 92).

28 It is also settled case-law that the taxable amount for the supply of goods or services is represented by the consideration actually received for them. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to

objective criteria. In addition, that consideration must be capable of being expressed in money (see *Fillibeck* v *Finanzamt Neustadt*, paragraphs 13 and 14 and the case-law cited).

29 In the case of the transaction at issue in the main proceedings, there is a direct link between the provision of retail vouchers by Astra Zeneca to its employees and the part of the cash remuneration which the employees must give up as consideration for that provision.

30 Instead of receiving all their remuneration in cash, the Astra Zeneca employees who have chosen to receive such vouchers must give up part of that remuneration in exchange for those vouchers, that transaction resulting in a specific deduction from their Fund.

31 Moreover, there is no doubt that Astra Zeneca actually receives consideration for the provision of the retail vouchers at issue and that that consideration is expressed in money, since it corresponds to a fraction of the cash remuneration of its employees.

32 In addition, as was shown at the hearing, the burden of the VAT on the provision of those vouchers is borne by the final consumer of the goods and/or services which may be bought with those vouchers, namely the employees of Astra Zeneca who receive the vouchers, since the deduction from their remuneration to which that provision gives rise includes the price of the vouchers concerned and all the VAT on them.

33 Therefore, as the Advocate General observed in point 45 of his Opinion, when an employee wishes to use such vouchers, he simply has to hand over the vouchers, which include VAT, to the retailer or the provider of the services concerned and receives, in exchange, the goods or services of his choice, it being understood that the price of those goods or those services, VAT included, was paid by that employee at the time when he chose to receive the retail vouchers concerned in return for giving up part of his remuneration and that it is only when those vouchers are used by that employee that the retailer or service provider will pay the VAT on those goods or services to the tax authorities.

34 Accordingly, the transaction at issue in the main proceedings constitutes a supply of services effected for consideration, within the meaning of Article 2(1) of the Sixth Directive.

35 Consequently, the answer to the first question is that Article 2(1) of the Sixth Directive must be interpreted as meaning that the provision of a retail voucher by a company, which acquired that voucher at a price including VAT, to its employees in exchange for their giving up part of their cash remuneration constitutes a supply of services effected for consideration within the meaning of that provision.

The second and third questions

36 In view of the answer given to the first question, there is no need to answer the second and third questions.

Costs

37 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 2(1) 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, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as meaning that the provision of a retail voucher by a

company, which acquired that voucher at a price including value added tax, to its employees in exchange for their giving up part of their cash remuneration constitutes a supply of services effected for consideration within the meaning of that provision.

[Signatures]

* Language of the case: English.