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JUDGMENT OF THE COURT (First Chamber)

19 July 2012 (\*)

(Sixth VAT Directive — Articles 11A(1)(a), 17(5) and 19(1) — Organisation of games of bingo — Legal obligation to use part of the card price to pay winnings to players — Calculation of the basis of assessment)

In Case C-377/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Cataluña (Spain), made by decision of 18 May 2011, received at the Court on 18 July 2011, in the proceedings

**International Bingo Technology SA**

v

**Tribunal Económico-Administrativo Regional de Cataluña (TEARC),**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, A. Borg Barthet, E. Levits and J.-J. Kasel (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Spanish Government, by S. Centeno Huerta, acting as Agent,
- the European Commission, by L. Lozano Palacios, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 11A(1)(a), 17(5) and 19(1) 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), as amended by Council Directive 98/80/EC of 12 October 1998 (OJ 1998 L 281, p. 31) ('the Sixth Directive').

2 The reference was made in proceedings between International Bingo Technology SA ('International Bingo') and the Tribunal Económico-Administrativo Regional de Cataluña (Regional Economic Administrative Court, Catalonia; TEARC) concerning calculation of the proportion of

value added tax ('VAT') deductible in 1999.

## Legal context

### *European Union law*

3 Article 11 of the Sixth Directive provides:

'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;

...'

4 In the version resulting from Article 28g of the Sixth Directive, Article 17(2)(a) and (5) thereof reads as follows:

'2. 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 in respect of goods or services supplied or to be supplied to him by another taxable person;

...

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which [VAT] is deductible, and for transactions in respect of which [VAT] is not deductible, only such proportion of the [VAT] shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.

However, Member States may:

(a) authorise the taxable person to determine a proportion for each sector of his business, provided that separate accounts are kept for each sector;

(b) compel the taxable person to determine a proportion for each sector of his business and to keep separate accounts for each sector;

(c) authorise or compel the taxable person to make the deduction on the basis of the use of all or part of the goods and services;

(d) authorise or compel the taxable person to make the deduction in accordance with the rule laid down in the first subparagraph, in respect of all goods and services used for all transactions referred to therein;

(e) provide that where the [VAT] which is not deductible by the taxable person is insignificant it shall be treated as nil.'

5 Article 19(1) of the Sixth Directive provides:

'The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

- as numerator, the total amount, exclusive of [VAT], of turnover per year attributable to transactions in respect of which [VAT] is deductible under Article 17(2) and (3);
- as denominator, the total amount, exclusive of [VAT], of turnover per year attributable to transactions included in the numerator and to transactions in respect of which [VAT] is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A(1)(a).

The proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.'

#### *Spanish law*

6 Article 104(1) of Law 37/1992 on value added tax (Ley 37/1992 del Impuesto sobre el Valor Añadido) of 28 December 1992 (BOE No 312 of 29 December 1992, p. 44247; 'the Law on VAT') provides:

'In cases where the general proportion rule is applied, only the percentage of the input tax resulting from paragraph 2 below may be deducted in each assessment period.

For the purposes of the previous subparagraph, tax payments which are not deductible under Articles 95 and 96 of this Law shall not be counted as part of the input tax.'

7 The first subparagraph of Article 104(2) of the Law on VAT provides:

'The proportion deductible under the previous paragraph shall be calculated by multiplying by 100 the result of a fraction having:

1. as numerator, the total amount per calendar year of goods or services in respect of which value added tax is deductible and which are supplied by the taxable person in the course of his business or profession or, as the case may be, in the relevant separate sector,
2. as denominator, the total amount per calendar year of goods or services, including those in respect of which value added tax is not deductible, which are supplied by the taxable person in the course of his business or profession or, as the case may be, in the relevant separate sector.'

8 The first subparagraph of Article 104(4) of the Law on VAT is worded as follows:

'For the purposes of calculating the proportion, the total amount of the transactions shall mean all the consideration corresponding to those transactions, determined in accordance with Articles 78 and 79 of this Law, including in relation to exempt and non-taxable transactions.'

9 Article 78(1) of the Law on VAT states:

'The taxable amount shall be composed of the total amount of the consideration for taxable transactions received from the customer or third parties.'

10 The Order of 9 January 1979 of the Departament de Governació of the Generalitat de Catalunya, in the version resulting from the Order of 18 January 1995, provides that 'the amount to be distributed in winnings in each game or draw shall consist of 69% of the face value of all the cards sold, 10% of which corresponds to a line and 59% to a full house'.

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

11 International Bingo is a company organising bingo games. It is subject to VAT, but exempt from that tax in respect of the turnover relating to the organisation of those games.

12 However, International Bingo carries out other activities in respect of which it is not VAT-exempt. Those activities include, in particular, the collection and payment of the 'bingo tax', which corresponds to a portion of the card price, which the organisers collect from the players and deposit with the competent tax authority. In consideration of that activity, the organisers receive a collection bonus of 10% of the amount of that tax. The amount of that bonus, which is subject to VAT, constitutes the taxable basis for the calculation of the VAT due from the organisers for their supply of services.

13 Since, in the rooms used for bingo games, the organisers carry out other activities which are not exempt from VAT, such as the operation of a bar or a restaurant, they are subject to the proportion rule for determining the deductible VAT under Article 17(5) of the Sixth Directive.

14 For the purposes of calculating that proportion, International Bingo has deducted from its turnover the amount of winnings which it had to distribute to the winners pursuant to the Law on VAT, which amount corresponds to a fixed percentage of the bingo card price. The Agencia Estatal de la Administración Tributaria (State Fiscal Administration Agency; 'the Agencia') does not share that view. It has decided that the amount of winnings paid to the winners should be included in the amount of turnover used as the basis for calculating the proportion.

15 Since the Tribunal Económico-Administrativo Regional de Catalunya dismissed the action brought against that decision of the Agencia by International Bingo, the latter appealed to the Tribunal Superior de Justicia de Catalunya (High Court of Justice of Catalonia), submitting that the judgment at first instance was contrary to the Sixth Directive as interpreted by the Court of Justice.

16 In the view of the national court, in order to rule on the dispute before it, it must be determined what constitutes the 'consideration actually received' by International Bingo for organising the game. In that regard, that court notes that some elements of the judgments in Case C-38/93 *Glawe* [1994] ECR I-1679 and Case C-498/99 *Town & County Factors* [2002] ECR I-7173 allow the view to be taken that an organiser of bingo games, such as that in question in the case before it, does not genuinely have at its disposal the portion of the card price which is intended to finance the winnings to be paid to winners.

17 Firstly, the amounts which correspond to the winnings are predetermined by legislation, which provides that the amount to be distributed in winnings in each game or draw shall consist of 69% of the face value of all the cards sold.

18 Furthermore, since the percentage of the card price which is repaid in the form of winnings is predetermined by legislation, there are no uncertainties in that regard. The amount paid as winnings in each game depends only on the number of cards sold and can be established by a

simple arithmetical calculation.

19 Finally, since the percentage of the card price which corresponds to the winnings to be distributed to winners is at the disposal of the organiser of the bingo game only for the time which elapses between the beginning of the game and the end of the game, that organiser can be regarded as the mere temporary custodian of the winnings.

20 The Tribunal Superior de Justicia de Cataluña states that the solution adopted by the Spanish courts as regards calculation of the basis of assessment in respect of a service such as that at issue in the dispute before it and the solution adopted by the courts of other Member States are diametrically opposite. Accordingly, it is necessary to ascertain whether the provisions of the Sixth Directive on the calculation of the proportion deductible are intended to harmonise the rules for that calculation.

21 That court has, furthermore, set out a number of points which, in its view, must be taken into account in the context of the present reference for a preliminary ruling. Thus, it states that:

- in the present case, within the price which players pay for each bingo card, it is possible to differentiate, legally and financially, between the amount allocated to winnings and the amount allocated to other items. That is the case of the portion used to pay the bingo tax and the portion constituting the consideration for the tax collection service supplied by the organiser of the game. In the light of that distinction, there can be no doubt that the portion of the price intended to pay winnings cannot be regarded as payment for the services supplied by the organiser;
- the organiser of the game is unable to pass on financially to the winners the VAT which is charged on the amounts allocated to winnings. Thus, there can be no transfer of the economic burden of that tax. The distortion of the neutrality of the VAT system arising therefrom could be mitigated if the winnings distributed were not included in the basis of assessment.

22 In those circumstances, the Tribunal Superior de Justicia de Cataluña has decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘1. For the purposes of constituting the chargeable event giving rise to the VAT, does the fact that bingo players pay the portion of the card price corresponding to the winnings amount to genuine consumption of goods and services?’
2. For the purposes of the rules governing the denominator used in the calculation of the percentage of the deductible proportion, is Article 11A(1)(a), in conjunction with Articles 17(5) and 19(1), of the Sixth Directive to be interpreted as requiring such a degree of harmonisation that it precludes the adoption in the Member States of different solutions in legislation or case-law with regard to the inclusion in the taxable amount for VAT of the portion of the card price allocated to the payment of winnings?’
3. For the purposes of constituting the denominator used in the calculation of the percentage of the deductible proportion, is Article 11A(1)(a), in conjunction with Articles 17(5) and 19(1), of the Sixth Directive to be interpreted as precluding national case-law which, in the case of the game of bingo, includes in the taxable amount for VAT the amount corresponding to winnings that is paid by players through the purchase of cards?’

### **Consideration of the questions referred**

#### *The first question*

23 By its first question, the national court asks, in essence, whether Article 11A(1)(a) of the

Sixth Directive is to be interpreted as meaning, in the case of the sale of bingo cards such as those at issue in the main proceedings, that the taxable amount for VAT includes the portion of the card price fixed in advance by legislation and intended to be used to pay winnings to players.

24 In order to answer that question, it is first necessary to point out that Article 11A(1)(a) of the Sixth Directive provides that '[t]he 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 including subsidies directly linked to the price of such supplies'.

25 Next, it must be borne in mind that it is settled case-law that that provision must be interpreted as meaning that the taxable amount for a supply of services is represented by the consideration actually received for that supply (see, inter alia, Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 19, and *Town & County Factors*, paragraph 27).

26 The Court has also held that, in the case of gaming machines, which, pursuant to mandatory statutory requirements, pay out as winnings, as in the main proceedings, a fixed percentage of the stakes inserted by players, the consideration actually received by the operator in return for making the machines available consists only of the proportion of the stakes which it can actually take for itself (*Glawe*, paragraph 9).

27 In the case of a game such as that at issue in the main proceedings, clearly the conditions for its operation are fixed by legislation and the percentage of the card price which must be paid as winnings to players is laid down in accordance with mandatory statutory provisions.

28 Since the portion of the card price which is paid as winnings to players is fixed in advance and is mandatory, it cannot be regarded as forming part of the consideration received by the organiser of the game for the supply of the service provided to players (see, to that effect, *Glawe*, paragraph 12).

29 It follows that, in the context of a game such as that at issue in the main proceedings, the consideration actually received by the organiser of the game for the service supplied consists of the card price after deduction of the portion of that price, fixed by legislation, which must be paid as winnings to players. The organiser actually has at its disposal and can take for itself only that portion of the sale price.

30 Finally, it must be pointed out that that interpretation of Article 11A(1)(a) of the Sixth Directive is consistent with that adopted by the Court in its judgment in *Town & County Factors*.

31 In that regard, as is apparent from paragraphs 29 and 30 of the judgment in *Town & County Factors*, the Court has held that the interpretation which it adopted in its judgment in *Glawe* did not apply to a service such as that at issue in the case which gave rise to the judgment in *Town & County Factors*. While the gaming machines in question in the case which gave rise to the judgment in *Glawe* were characterised by the fact that, in accordance with mandatory statutory provisions, they were set in such a way that a certain percentage of the players' stakes was paid out to them as winnings and those stakes were kept technically and physically separate from the stakes which the operator could actually take for itself, the competition at issue in the case which gave rise to the judgment in *Town & County Factors* did not display any of those features, so that the organiser of that type of competition had freely at its disposal the full amount of the entry fees received.

32 In the context of a game such as that at issue in the main proceedings, the organiser can

indeed not make free use of the full amount of the card price since it is required to return a percentage, fixed by legislation, of that card price to the players as winnings.

33 Accordingly, the answer to the first question is that Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that, in the case of the sale of bingo cards such as those at issue in the main proceedings, the taxable amount for VAT does not include the portion of the card price fixed in advance by legislation and intended to be used to pay winnings to players.

#### *The second and third questions*

34 By its second and third questions, which it is appropriate to examine together, the national court asks, in essence, whether Articles 17(5) and 19(1) of the Sixth Directive must be interpreted as meaning that the Member States may provide that, for the purposes of calculating the deductible proportion of VAT, the portion of the bingo card price which must be returned to players as winnings, fixed in advance by legislation, is to be regarded as forming part of the turnover which must be included in the denominator of the fraction referred to in Article 19(1).

35 In order to answer those questions, it is necessary to bear in mind, firstly, the wording of the 12th recital in the preamble to the Sixth Directive, according to which ‘the rules governing deductions should be harmonised to the extent that they affect the actual amounts collected [and] the deductible proportion should be calculated in a similar manner in all the Member States’.

36 Moreover, the wording of Article 11A(1)(a) of the Sixth Directive is clear and that provision leaves the Member States no discretion in determining what is to be regarded as constituting the consideration which has been or is to be obtained by the supplier from the purchaser.

37 Furthermore, the Court has already held in that regard that the Sixth Directive must be interpreted as precluding a Member State from applying to certain transactions a rule for determining the taxable amount other than the general rule laid down in Article 11A(1)(a) of that directive, when the procedure provided for in Article 27 of that directive to obtain authorisation for such derogation from that general rule has not been followed by that Member State (see, to that effect, Case C-285/10 *Campsa Estaciones de Servicio* [2011] ECR I-5059, paragraph 40).

38 Secondly, it must be noted that, as follows from the answer to the first question, in a situation such as that at issue in the main proceedings, the portion fixed in advance by legislation of the bingo card price which must be returned to players as winnings is not to be included in the turnover and, accordingly, cannot be regarded as forming part of the turnover of the organiser of the game. Consequently, the corresponding amounts must not be included in the denominator of the fraction used to calculate, pursuant to Article 19(1) of the Sixth Directive, the deductible proportion of input VAT paid.

39 Accordingly, the answer to the second and third questions is that Articles 17(5) and 19(1) of the Sixth Directive must be interpreted as meaning that the Member States may not provide that, for the purposes of calculating the deductible proportion of VAT, the portion, fixed in advance by legislation, of the bingo card price which must be returned to players as winnings is to be regarded as forming part of the turnover which must be included in the denominator of the fraction referred to in Article 19(1).

#### **Costs**

40 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 (First Chamber) hereby rules:

**1. 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, as amended by Council Directive 98/80/EC of 12 October 1998, must be interpreted as meaning that, in the case of the sale of bingo cards such as those at issue in the main proceedings, the taxable amount for VAT does not include the portion of the card price fixed in advance by legislation and intended to be used to pay winnings to players.**

**2. Articles 17(5) and 19(1) of Sixth Directive 77/388, as amended by Directive 98/80, must be interpreted as meaning that the Member States may not provide that, for the purposes of calculating the deductible proportion of VAT, the portion, fixed in advance by legislation, of the bingo card price which must be returned to players as winnings is to be regarded as forming part of the turnover which must be included in the denominator of the fraction referred to in Article 19(1).**

[Signatures]

\* Language of the case: Spanish.