

Dixons Retail

21 November 2013

C-494/12

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JUDGMENT OF THE COURT (Second Chamber)

21 November 2013 (*)

(Directive 2006/112/EC – Value added tax – Supply of goods – Concept – Fraudulent use of a bank card)

In Case C-494/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the First-tier Tribunal (Tax Chamber) (United Kingdom), made by decision of 26 October 2012, received at the Court on 5 November 2012, in the proceedings

Dixons Retail plc

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Dixons Retail plc, by A. Brown, lawyer,
- the United Kingdom Government, by A. Robinson, acting as Agent,
- the European Commission, by R. Lyal, A. Cordewener and C. Soulay, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling relates to the interpretation of Articles 14(1) and 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Dixons Retail plc ('Dixons') and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') concerning the latter's refusal of the claim made by Dixons for repayment of value added tax ('VAT') declared and paid by it in respect of transactions carried out between 13 November 2005 and 30 November 2008.

Legal context

Directive 77/388/EEC

3 Article 2(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; 'the Sixth Directive') states:

'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 5(1) of the Sixth Directive states:

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

5 Article 11A(1) of the Sixth Directive is worded as follows:

'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;

...'

Directive 2006/112

6 Article 2(1)(a) of Directive 2006/112 provides that the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

7 Article 14(1) of Directive 2006/112 states:

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

8 As set out in Article 73 of Directive 2006/112:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

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

9 Dixons is the representative member of a VAT group which sells electrical items.

10 Dixons had an agreement with American Express Europe Ltd ('AmEx') under which, if one of Dixon's customers used a card issued by AmEx as a means of payment, Dixons was obliged to accept the card and AmEx undertook, subject to compliance with the procedures laid down, to pay it the price of the goods purchased by that customer with the card, after deduction of a charge.

11 In the case of transactions paid for with cards other than those issued by AmEx, Dixons had a similar agreement with National Westminster Bank plc, acting under the name Streamline ('Streamline').

12 After declaring and paying the VAT relating to transactions carried out between 13 November 2005 and 30 November 2008, Dixons claimed repayment of that tax from the Commissioners, who rejected its claim.

13 Dixons brought an appeal before the First-tier Tribunal (Tax Chamber) against the Commissioners' decision in order to obtain repayment of the VAT.

14 The appeal brought before the referring tribunal concerns card transactions in respect of which, although they subsequently turned out to have been paid for by means of cards used in a fraudulent manner, Dixons, in accordance with the procedures laid down by the agreements concluded with AmEx and Streamline, received payment of the price from the latter.

15 In this connection, it is apparent from the order for reference that, despite the fraudulent use of cards, neither AmEx nor Streamline respectively exercised recourse against Dixons or made a chargeback, as they were authorised to do by those agreements if the procedures laid down by the agreements were not complied with. Dixons therefore retained the payments made by AmEx and Streamline, which included a VAT element.

16 It was in those circumstances that the First-tier Tribunal (Tax Chamber) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 14(1) [of Directive 2006/112] to be interpreted as applying when the physical transfer of goods is obtained by fraud in that the payment provided by the transferee is by means of a card which the transferee knows he has no authority to use?

(2) When the physical transfer of goods is obtained by fraudulent use of a card, is there a “transfer of the right to dispose of tangible property as owner” within Article 14(1)?

(3) Is Article 73 [of Directive 2006/112] to be interpreted as applying when payment is obtained by the transferor of goods under an agreement with a third party to make such payment in respect of card transactions notwithstanding that the transferee of the goods knows that he has no authority to use the card?

(4) When payment is made by a third party pursuant to an agreement between the transferor of the goods and the third party as a consequence of the presentation to the transferor of a card which the transferee of the goods has no authority to use is the payment obtained from the third party “in return for the supply” within Article 73?’

Consideration of the questions referred

17 By its questions, which it is appropriate to examine together, the referring tribunal asks, in essence, whether the physical transfer of goods to a purchaser who fraudulently uses a bank card as a means of payment constitutes a ‘supply of goods’ within the meaning of Article 5(1) of the Sixth Directive and Article 14(1) of Directive 2006/112 and whether, in the context of such a transfer, the payment made by a third party, under an agreement concluded between it and the supplier of those goods by which the third party has undertaken to pay the supplier for the goods sold by the latter to purchasers using such a card as a means of payment, constitutes ‘consideration’ within the meaning of Article 11A(1)(a) of the Sixth Directive and Article 73 of Directive 2006/112.

18 A preliminary point to note is that, as Directive 2006/112 entered into force on 1 January 2007, its provisions are applicable only to the transactions at issue in the main proceedings that were carried out after that date. The provisions of the Sixth Directive must be applied to the transactions carried out before that date. In order to answer the questions referred, it is not necessary to distinguish between the provisions of those directives as their purport must be regarded as essentially identical for the purposes of the interpretation that the Court will be required to give in the present case.

Existence of a ‘transfer’ within the meaning of Article 5(1) of the Sixth Directive and Article 14(1) of Directive 2006/112

19 It should be noted at the outset that the Sixth Directive and Directive 2006/112 establish a common system of VAT based, inter alia, on a uniform definition of taxable transactions (see Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 36; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 48; and Case C-653/11 *Newey* [2013] ECR I-0000, paragraph 39).

20 In this connection, according to settled case-law of the Court, the concept of ‘supply of goods’ in Article 5(1) of the Sixth Directive and Article 14(1) of Directive 2006/112 does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner (see Case C-435/03 *British American Tobacco and Newman Shipping* [2005] ECR I-7077, paragraph 35; *Optigen and Others*, paragraph 39; *Halifax and Others*, paragraph 51; Case C-237/09 *De Fruytier* [2010] ECR I-4985, paragraph 24; and Case C-78/12 *Evita-K* [2013] ECR I-0000, paragraph 33).

21 The Court has likewise held that that concept is objective in nature and that it applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person in question or for them to take account of the intention of a trader other than that taxable person involved in the same chain of supply (see, to this effect, *Optigen and Others*, paragraphs 44 to 46, 51 and 55; *Halifax and Others*, paragraphs 56 and 57; Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraphs 41 to 44; and *Newey*, paragraph 41).

22 It follows that transactions such as those at issue in the main proceedings constitute supplies of goods within the meaning of Article 5(1) of the Sixth Directive and Article 14(1) of Directive 2006/112 provided that they satisfy the objective criteria on which that concept is based and are not vitiated by VAT fraud (see, to this effect, *Optigen and Others*, paragraphs 51 and 52, and *Halifax and Others*, paragraphs 58 and 59).

23 Here, it is not in dispute that Dixons was the owner of the goods supplied in the transactions at issue in the main proceedings and that, consequently, it was in a position to transfer to the person acquiring those goods the right to dispose of them as owner.

24 Nor is there anything in the file submitted to the Court that gives rise to doubt that Dixons voluntarily handed those goods over to the person acquiring them in order to empower him actually to dispose of them as if he were their owner.

25 Furthermore, it does not appear that tax fraud was committed in connection with the transactions at issue in the main proceedings, since, as is clear from the order for reference, the VAT relating to those transactions was duly declared and paid by Dixons.

26 The fraudulent use of a bank card as a means of payment when those transactions were carried out does not affect the ability to classify them as supplies of goods within the meaning of the Sixth Directive and Directive 2006/112. Such use is a matter not of the objective criteria on which that concept is based but of the intention of the person who has taken part, as the person acquiring the goods, in the transactions at issue and of the processes carried out in order to give effect to that intention.

27 Accordingly, it must be found that a ‘transfer’, within the meaning of Article 5(1) of the Sixth Directive and Article 14(1) of Directive 2006/112, exists between Dixons and its customers, even though the latter, when the transactions at issue in the main proceedings were carried out, fraudulently used a bank card as a means of payment for the goods supplied by Dixons.

28 It should be added that, contrary to Dixons’ contentions, a situation such as that at issue in the main proceedings must be distinguished from that of theft of goods, which is not covered by the concept of ‘supply of goods’ under the Sixth Directive and Directive 2006/112 (see *British American Tobacco and Newman Shipping*, paragraph 33).

29 The theft of goods does not have the effect of empowering the thief to dispose of the goods under the same conditions as their owner. A theft cannot therefore be regarded as effecting a transfer, within the meaning of Article 5(1) of the Sixth Directive and Article 14(1) of Directive 2006/112, from the victim to the thief (see *British American Tobacco and Newman Shipping*, paragraph 32).

30 Moreover, the theft of goods, by definition, does not give rise to any payment in return to the victim of the theft. It therefore cannot as such be regarded as a supply of goods ‘for consideration’ within the meaning of Article 2(1) of the Sixth Directive and Article 2(1)(a) of Directive 2006/112 (see *British American Tobacco and Newman Shipping*, paragraph 32).

Existence of 'consideration' within the meaning of Article 11A(1)(a) of the Sixth Directive and Article 73 of Directive 2006/112

31 As regards the question whether, in the context of the transactions at issue in the main proceedings, the payments made by AmEx and Streamline pursuant to the agreements concluded between them and Dixons constitute 'consideration' within the meaning of Article 11A(1)(a) of the Sixth Directive and Article 73 of Directive 2006/112, it is to be recalled that, within the framework of the VAT system, taxable transactions presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. Thus, where a person's activity consists exclusively in supplying goods for no direct consideration, there is no basis of assessment and the supplies of goods concerned are therefore not subject to VAT (see, *inter alia*, with regard to supplies of services, Case C-16/93 Tolsma [1994] ECR I-743, paragraph 12, and Case C-93/10 GFKL Financial Services [2011] ECR I-10791, paragraph 17).

32 In this context, the Court has held that a supply of goods is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive and Article 2(1)(a) of Directive 2006/112, and hence is taxable, only if there is a legal relationship between the supplier of the goods and the recipient pursuant to which there is reciprocal performance, the remuneration received by the supplier of the goods constituting the value actually given in return for the goods supplied to the recipient (see, *inter alia*, with regard to supplies of services, Tolsma, paragraph 14, and GFKL Financial Services, paragraph 18).

33 The taxable amount for the supply of goods is everything received by way of consideration for the goods (see, *inter alia*, with regard to supplies of services, Tolsma, paragraph 13, and Case C-40/09 Astra Zeneca UK [2010] ECR I-7505, paragraph 28), so that such a supply is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive and Article 2(1)(a) of Directive 2006/112 if a direct link exists between the goods supplied and the consideration received (see Joined Cases C-53/09 and C-55/09 Loyalty Management UK and Baxi Group [2010] ECR I-9187, paragraph 51, and Case C-165/11 Profitube [2012] ECR I-0000, paragraph 51).

34 When a purchaser pays the price of goods by means of a credit card, one is directly faced with two transactions, namely, on the one hand, the sale of the goods by a supplier, who calculates in the total price demanded the VAT which will be paid by the purchaser as the final consumer and which is charged by the supplier on behalf of the revenue authorities, and, on the other hand, the provision of services to the supplier by the card issuer. The services provided are those of guaranteeing payment for the goods purchased by means of the card, promotion of the supplier's business by enabling him to acquire new customers, possible publicity on his behalf or some other services (see Case C-18/92 Bally [1993] ECR I-2871, paragraph 9).

35 The fact that the purchaser has paid the price agreed not directly to the supplier but through the card issuer and the method of payment used in the relations between the purchaser and the supplier cannot change the taxable amount. It is not a requirement of the Sixth Directive and Directive 2006/112 that, for a supply of goods or services to be effected 'for consideration', the consideration for the supply must be obtained directly from the person to whom the goods or services are supplied. Under Article 11A(1)(a) of the Sixth Directive and Article 73 of Directive 2006/112, the payment of the consideration for a supply of goods may be made not only by the purchaser but also by a third party, in this instance the card issuer (see Bally, paragraphs 16 and 17, and Loyalty Management UK and Baxi Group, paragraph 56).

36 Consequently, the fact that payment of the price of the goods supplied by Dixons within the framework of the transactions at issue in the main proceedings was made by third parties, in the case in point AmEx and Streamline, cannot lead to the conclusion that that payment does not constitute the consideration obtained by Dixons for the supply of those goods.

37 Likewise, inasmuch as, as is apparent from the file submitted to the Court, Dixons complied with the procedures laid down by the agreements concluded with AmEx and Streamline and, in addition, the sales at issue in the main proceedings satisfy the objective criteria on which the concept of 'supply of goods' within the meaning of the Sixth Directive and Directive 2006/112 is based, the fact that those sales subsequently turned out to have been paid for by means of cards used in a fraudulent manner cannot have the consequence that the payment of the price of those sales does not constitute the consideration obtained by Dixons in respect of the sales.

38 Accordingly, the answer to the questions referred is that Articles 2(1), 5(1) and 11A(1)(a) of the Sixth Directive and Articles 2(1)(a), 14(1) and 73 of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the physical transfer of goods to a purchaser who fraudulently uses a bank card as a means of payment constitutes a 'supply of goods' within the meaning of Articles 2(1) and 5(1) of the Sixth Directive and Articles 2(1)(a) and 14(1) of Directive 2006/112 and that, in the context of such a transfer, the payment made by a third party, under an agreement concluded between it and the supplier of those goods by which the third party has undertaken to pay the supplier for the goods sold by the latter to purchasers using such a card as a means of payment, constitutes 'consideration' within the meaning of Article 11A(1)(a) of the Sixth Directive and Article 73 of Directive 2006/112.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring tribunal, the decision on costs is a matter for that tribunal. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Articles 2(1), 5(1) and 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 and Articles 2(1)(a), 14(1) and 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the physical transfer of goods to a purchaser who fraudulently uses a bank card as a means of payment constitutes a ‘supply of goods’ within the meaning of Articles 2(1) and 5(1) of Directive 77/388 and Articles 2(1)(a) and 14(1) of Directive 2006/112 and that, in the context of such a transfer, the payment made by a third party, under an agreement concluded between it and the supplier of those goods by which the third party has undertaken to pay the supplier for the goods sold by the latter to purchasers using such a card as a means of payment, constitutes ‘consideration’ within the meaning of Article 11A(1)(a) of Directive 77/388 and Article 73 of Directive 2006/112.

[Signatures]

* Language of the case: English.