Court of Justice of the European Communities (including Court of First Instance Decisions)

JUDGMENT OF THE COURT (Second Chamber)
7 October 2010 (*)

(Sixth VAT Directive – Taxable amount – Sales promotion scheme – Loyalty rewards scheme allowing customers to earn points from traders and to redeem them for loyalty rewards – Payments made by the operator of the scheme to redeemers supplying the loyalty rewards – Payments made by the trader to the operator of the scheme supplying the loyalty rewards)

In Joined Cases C-53/09 and C-55/09,

REFERENCES for a preliminary ruling under Article 234 EC from the House of Lords (United Kingdom), made by decisions of 15 December 2008, received at the Court on 6 and 9 February 2009 respectively, in the proceedings

Commissioners for Her Majesty's Revenue and Customs

v

Loyalty Management UK Ltd (C-53/09),

Baxi Group Ltd (C-55/09),

THE COURT (Second Chamber),

composed of J. N. Cunha Rodrigues, President of the Chamber, P. Lindh, A Rosas (Rapporteur), U. Lõhmus and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 January 2010,

after considering the observations submitted on behalf of:

– Loyalty Management UK Ltd, by G. Sinfield, Solicitor, and D. Milne, QC,

– Baxi Group Ltd, by B. Cooper, Solicitor, and D. Scorey, Barrister,

– the United Kingdom Government, by L. Seeboruth and S. Hathaway, acting as Agents, and by R. Hill, Barrister,

– the Greek Government, by K. Georgiadis, I. Bakopoulos and M. Tassopoulou, acting as Agents,

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

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

gives the following

Judgment

1 The present references for a preliminary ruling relate to the interpretation of Articles 5, 6, 11.A(1)(a) and – in the version resulting from Article 28f(1) – 17(2) 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 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) ('the Sixth Directive').

2 The references have been made in two sets of proceedings, in one of which (Case C-53/09) the opposing parties are the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') and Loyalty Management UK Ltd ('LMUK') and, in the other (Case C-55/09), the Commissioners and Baxi Group Ltd ('Baxi'), the issue being the classification, for the purposes of value added tax ('VAT'), of the consideration for payments made, respectively, by the operator of a loyalty rewards scheme to the redeemers who supply the loyalty rewards to customers and by the trader to the operator of the loyalty rewards scheme supplying such rewards.

Legal context

European Union law

3 Under Article 2.1 of the Sixth Directive, supplies of goods and services effected for consideration within the territory of the country by a taxable person acting as such are subject to VAT.

4 Under Article 5 of that directive:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

…

6. The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly [VAT] deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated.'

5 Article 6 of that directive provides:

'1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

…

2. The following shall be treated as supplies of services for consideration:

…

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

…'.

6 Article 11.A(1)(a) 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'.

7 Under Article 17(2), in the version resulting from Article 28f(1), of the Sixth Directive:

'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;

(b) [VAT] due or paid in respect of imported goods within the territory of the country;

(c) [VAT] due pursuant to Articles 5(7)(a), 6(3) and 28a(6)'.

8 Articles 14, 16, 24, 26, 73, 74 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) essentially reproduce the wording of Articles 5, 6, 11.A(1)(a) and – in the version resulting from Article 28f(1) – 17(2) of the Sixth Directive.

National law

9 It is evident from the documents submitted to the Court that the relevant provisions of national law are sections 2, 5, 19, 24, 25 and 26 of the Value Added Tax Act 1994, paragraphs 1 to 5 of Schedule 4 to that Act and paragraph 6 of Schedule 6 thereto. Those provisions reproduce the corresponding articles of the Sixth Directive.

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

Case C-53/09

10 LMUK operates a customer loyalty rewards scheme. Under this scheme, customers earn points which they can redeem for loyalty rewards consisting of goods or services when they purchase significant quantities of goods or services from retailers participating in the scheme. There are four actors in this scheme: the sponsors, that is to say, the retailers seeking to encourage customers to buy more from them; the customers; the operator of the scheme concerned, namely LMUK; and the redeemers, that is to say, the companies which supply loyalty rewards to customers in return for their points.

11 The sponsors award points to customers for each purchase on the basis of the amount of money spent. When the customer accumulates a sufficient number of points, he may receive a loyalty reward in return for those points, either for no payment or at a reduced price. The loyalty rewards are obtained by the redeemers.

12 Under this scheme, the sponsors pay to LMUK a specified sum of money in respect of each point issued. They also pay an annual fee for the marketing, development and promotion of the scheme in question. The redeemers receive a fixed amount of money from LMUK for each point redeemed; this sum is described as a 'service charge'.

13 The redeemers issue an invoice to LMUK in respect of that charge which is inclusive of VAT. When LMUK sought to deduct that input VAT, the Commissioners decided that the tax paid constituted a tax on a charge which represents a payment made as the consideration for transactions carried out by the redeemers, not for the benefit of LMUK, but for the benefit of the customers, although payment for those transactions is made, wholly or in part, by LMUK. The Commissioners thus took the view that the charge in question was third-party consideration for the supply of loyalty rewards to customers and, consequently, that LMUK was not entitled to deduct the input tax paid on that charge.

14 LMUK challenged that decision before the VAT and Duties Tribunal. That tribunal took the view that the supplies of goods to customers made by the redeemers in return for points had to be considered to be supplies of services to LMUK.

15 The Commissioners brought an appeal against that decision before the High Court of Justice of England and Wales. That court, reversing the decision of the VAT and Duties Tribunal, held that the redeemers were supplying loyalty rewards to customers and that the charge concerned was consideration paid by a third party, namely LMUK, for that supply. The Commissioners also raised an 'alternative argument' before the High Court of Justice of England and Wales, relating to the case where the rewards consisted of goods, to the effect that, if the redeemers supplied such goods to LMUK, it followed that LMUK was liable to output tax on the deemed onward supply of those same goods to customers pursuant to Article 5(6) of the Sixth Directive. The High Court of Justice of England and Wales found in the Commissioners' favour on the alternative argument.

16 LMUK took the case to the Court of Appeal (England and Wales), which reversed the judgment of the High Court of Justice of England and Wales. The Court of Appeal (England and Wales) took the view that LMUK paid the charge to the redeemers as consideration for the service supplied by them to LMUK. Consequently, LMUK was entitled to deduct the VAT payable on that charge.

17 On a further appeal by the Commissioners, the House of Lords concluded that a ruling from the Court of Justice on the interpretation of Directive 2006/112, formerly the Sixth Directive, was required to enable it to give judgment in the proceedings before it.

18 In those circumstances, the House of Lords decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> 'In circumstances where a taxable person ("the Promoter") is engaged in the business of running a multi-participant customer loyalty rewards scheme … pursuant to which the Promoter enters into various agreements as follows:
>
> (a) Agreements with various companies referred to as "Sponsors" under which the Sponsors issue "Points" to customers … who purchase goods or services from the Sponsors and the Sponsors make payments to the Promoter;
>
> (b) Agreements with the [customers] which include provisions such that, when they purchase goods and/or services from the Sponsors, they will receive points which they can redeem for goods and/or services; and
>
> (c) Agreements with various companies (known as "Redeemers") under which the Redeemers agree, among other things, to provide goods and/or services to [customers] at a price which is less than would otherwise be payable or for no cash payment when the [customer] redeems the Points and in return the Promoter pays a "Service Charge" which is calculated according to the number of Points redeemed with that Redeemer during the relevant period;
>
> (1) How are Articles 14, 24 and 73 of [Directive 2006/112] … (formerly Articles 5, 6 and 11.A(1)(a) of [the Sixth Directive] …) to be interpreted where payments are made by the Promoter to the Redeemers?
>
> (2) In particular, are those provisions to be interpreted such that the payments of the kind made by the Promoter to Redeemers are to be characterised as:

(a) consideration solely for the supply of services by the Redeemers to the Promoter; or

(b) consideration solely for the supply of goods and/or services by the Redeemers to the [customers]; or

(c) consideration in part for the supply of services by the Redeemers to the Promoter and in part for the supply of goods and/or services by the Redeemers to the [customers]?

(3) If the answer to question 2 is (c), so that the Service Charge is consideration for two supplies by the Redeemers, one to the Promoter and the other to the [customers], what are the criteria laid down by Community law to determine how a charge such as the Service Charge is to be apportioned between those two supplies?'

Case C-55/09

19 Baxi is part of a group of companies which manufacture boilers and other associated heating products. That group of companies set up a loyalty reward scheme for customers, in this case installers of boilers, in order to encourage them to purchase its products. To use the terms employed in paragraph 10 of this judgment, Baxi acts as the sponsor in this scheme.

20 Customers participating in the scheme receive points which they can redeem for loyalty rewards, which comprise goods or services, when they purchase Baxi's products. It must, however, be pointed out that it is evident from the order for reference that the dispute in the main proceedings relates only to loyalty rewards in the form of goods.

21 Baxi subcontracted the operation of the loyalty rewards scheme at issue to @1 Ltd ('@1'). Under the general conditions of this scheme, customers have a contractual relationship with Baxi.

22 @1's operation of the loyalty rewards scheme at issue covers, inter alia, its marketing to customers by means of catalogues and the internet, the handling of applications for registration, management of customers' accounts, the choice, purchase and supply of the loyalty rewards, and the provision of a telephone helpline for customers.

23 Thus, one significant difference between this scheme and that at issue in Case C-53/09 is the fact that @1 chooses and purchases the loyalty rewards and supplies them to customers. Consequently, that company acts simultaneously as the operator of the customer loyalty rewards scheme and as the redeemer. The loyalty rewards are supplied solely in exchange for points. It is not possible to receive a loyalty reward in the form of a reduced purchase price. Baxi pays to @1 the retail sale price of the loyalty rewards and certain charges for specific services.

24 Baxi sought to deduct the VAT on the amounts which it paid to @1. The Commissioners took the view that the amount of the retail sale price of the articles paid by Baxi to @1 consisted of two elements. One element in that amount was the consideration for the services supplied by @1 to Baxi, in respect of which services Baxi was entitled to deduct the VAT invoiced by @1. The other element was third-party consideration for the supplies of goods by @1 to the customers, in respect of which Baxi could not deduct VAT.

25 Baxi challenged that decision before the VAT and Duties Tribunal. That tribunal dismissed Baxi's claim, holding that @1 was supplying the loyalty rewards to Baxi, which then supplied them to the customers without consideration. Baxi was therefore entitled to deduct the input VAT charged on the supply of goods which it received, but was obliged to account for the output VAT chargeable on the subsequent transmission of the goods to customers.

26 Baxi brought an appeal against that decision before the High Court of Justice of England and Wales, which held that @1 had supplied the loyalty rewards to customers and not to Baxi, but that @1 had also supplied services to Baxi which included the supply of those goods to customers. The price paid by Baxi constituted the consideration for the supply of that service and Baxi was therefore entitled to treat all the VAT invoiced by @1 as input tax.

27 The Commissioners brought the matter before the Court of Appeal (England and Wales), which held that Baxi was entitled to recover VAT on the whole of its payment to @1. In the view of that court, Baxi had to be regarded as having made the whole of the payment in return for a service supplied to it by @1 which consisted, in part, of the supply of articles to customers, thereby promoting Baxi, engendering customer loyalty and discharging Baxi from its obligations vis-à-vis the customers under the loyalty rewards scheme.

28 On an appeal brought by the Commissioners, the House of Lords concluded that a ruling by the Court of Justice on the interpretation of Directive 2006/112, formerly the Sixth Directive, was required to enable it to give judgment in the proceedings before it.

29 In those circumstances, the House of Lords decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> ‘In circumstances where
>
> (a) a taxable person runs a business promotion scheme operated by an advertising and marketing company under which “points” are issued to the taxable person’s customers in connection with the purchase of goods by the customers from the taxable person;
>
> (b) customers redeem the points by obtaining reward goods from the advertising and marketing company without payment;
>
> (c) the taxable person has agreed with that other company to pay it the recommended retail price of the reward goods:
>
> (1) How are Articles 14, 24 and 73 and 168 of Directive 2006/112 … (formerly Articles 5, 6 and 11.A(1)(a) and 17(2) [in the version resulting from Article 28f(1)] of [the Sixth Directive] to be interpreted as regards the payments by the taxable person to the other company?
>
> (2) In particular, are those provisions to be interpreted such that the payments by the taxable person to the other company are to be characterised:
>
> (a) solely as consideration for a supply of services by the other company to the taxable person;
>
> (b) solely as third-party consideration for the supply of goods by the other company to the customers;
>
> (c) as consideration in part for the supply of services by the other company to the taxable person and in part for the supply of goods by the other company to the customers; or
>
> (d) as consideration for supplies both of advertising and marketing services and of reward goods by the other company to the taxable person?
>
> (3) If the answer to question 2 is that such payments are to be characterised in part as consideration for a supply of services by the other company to the taxable person and in part as third-party consideration from the taxable person to the other company in respect of the other company’s supply of goods to the customers, what are the criteria laid down by Community law to determine how the payment is to be apportioned between those two supplies?’

30 By order of the President of the Court of 11 March 2009, Cases C-53/09 and C-55/09 were joined for the purposes of the written and oral procedure and judgment.

Preliminary observations

31 As the House of Lords refers in the orders for reference both to the Sixth Directive and to Directive 2006/112, it has to be pointed out that the latter directive was adopted on 28 November 2006 and that the date on which it entered into force, namely 1 January 2007, post-dates the facts in the main proceedings. Accordingly, the questions referred should be answered solely on the basis of the Sixth Directive.

32 It must also be stated, in relation to Case C-53/09, that neither the questions referred by the national court nor the views exchanged before the Court of Justice touched on the relationship between the sponsors

and the operator of the loyalty reward scheme, namely LMUK. Consequently, the Court will confine its assessment to the questions as referred by the national court.

The questions referred for a preliminary ruling

33 By its questions, which it is appropriate to examine together, the House of Lords asks, in essence, whether, in the context of a customer loyalty reward scheme such as those at issue in the main proceedings:

– payments made by the operator of the scheme at issue to redeemers who supply loyalty rewards to customers must be considered, in Case C-53/09, as third'party consideration for a supply of goods to those customers, and/or, as the case may be, for a supply of services made by those redeemers for the benefit of those customers, and/or as the consideration for a supply of services made by those redeemers for the benefit of the operator of that scheme, and whether

– payments made by the sponsor to the operator of the scheme at issue who supplies loyalty rewards to customers must be considered, in Case C-55/09, as third-party consideration for a supply of goods made by the operator of that scheme to those customers and/or as the consideration for a supply of services made by that operator for the benefit of that sponsor.

Observations submitted to the Court

34 In Case C-53/09, LMUK argues that the payments which it made to the redeemers constitute the consideration for services supplied to it by the redeemers. Those services, it submits, consist of various contractually agreed services, including the redeemers' undertaking to supply goods or services to customers without charge or at a reduced price.

35 In Case C-55/09, Baxi maintains that the payments which it made to @1 constitute consideration for the services supplied to it by @1. Those services, it argues, involve various advertising services, including the supply of loyalty rewards to customers together with the provision of information on Baxi's customers.

36 According to the United Kingdom Government, the Greek Government and the European Commission, the payments made, in Case C-53/09, by LMUK to the redeemers must be regarded as the consideration, obtained from a third party, namely LMUK, for a supply of goods made by the redeemers to customers and/or, according to the nature of the loyalty reward, for a supply of services made by those redeemers for the benefit of those customers.

37 In Case C-55/09, those Governments and the Commission express the view that the payments made by Baxi to @1 must be regarded as the consideration, obtained from a third party, namely Baxi, for a supply of goods made by @1 to customers. Nevertheless, the United Kingdom Government and the Commission both accept that one element of the payments which Baxi made to @1, namely the difference between the retail sale price of the loyalty rewards, paid by Baxi to @1, and the purchase price at which @1 acquired the loyalty rewards, constitutes the consideration for the services which @1 supplied to Baxi.

The Court's reply

38 It must be recalled that the principle of the common system of VAT involves the application to goods and services, up to and including the retail trade stage, of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged (see, inter alia, Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraph 21).

39 It must also be recalled that consideration of economic realities is a fundamental criterion for the application of the common system of VAT (see, first, as regards the meaning of place of business for the purposes of VAT, Case C-260/95 *DFDS* [1997] ECR I-1005, paragraph 23, and Case C-73/06 *Planzer Luxembourg* [2007] ECR I-5655, paragraph 43, and, secondly, as regards the identification of the person to whom goods are supplied, by analogy, Case C-185/01 *Auto Lease Holland* [2003] ECR I-1317, paragraphs 35 and 36).

40 In the light of the foregoing, it is necessary, in order to provide an answer to the questions referred, to determine, in the first place, the nature of the transactions carried out within the context of the loyalty rewards schemes at issue in the cases in the main proceedings.

41 It is evident from the orders for reference that the loyalty rewards schemes at issue were designed to encourage customers to make their purchases from particular traders. To that end, LMUK, in Case C-53/09, and @1, in Case C-55/09, provide a number of services linked to the operation of those schemes.

42 Nevertheless, the economic reality is that, under those schemes, loyalty rewards, which may consist of both goods and, in Case C-53/09, services, are supplied by the redeemers to the customers.

43 In order to determine whether that transaction, consisting of the supply of loyalty rewards, is subject to VAT, it is necessary to ascertain whether, pursuant to Article 2.1 of the Sixth Directive, this constitutes a supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

44 Article 5(1) of the Sixth Directive provides that a 'supply of goods' is to be understood as meaning the transfer of the right to dispose of tangible property as owner.

45 It is clear from the wording of that provision that 'supply of goods' 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 the recipient were the owner of the property (see Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 7, and *Auto Lease Holland*, paragraph 32).

46 Article 6(1) of the Sixth Directive defines 'supply of services' as any transaction which does not constitute a supply of goods.

47 It is evident from the order for reference in Case C-53/09 that LMUK enters into contracts with the redeemers under which, when the redeemers supply loyalty rewards to customers in return for points, LMUK pays to those redeemers an agreed value for those points. Thus, under the contract entered into by LMUK with each redeemer, the possibility of the redeemers receiving any payment from LMUK is in fact conditional on the supply by the redeemers of loyalty rewards to the customers, rewards which can take the form not only of tangible goods but also of services. Only in this way can the redeemers obtain points which then give rise to the making of payment by LMUK.

48 It is also evident from the order for reference in Case C-55/09 that @1 acquires supplies of loyalty rewards and that the stock of those rewards is the property of @1. Consequently, @1 is not only entitled to transfer the loyalty rewards to customers as if it were the owner of them but, in fact, it is the owner of them. It is also clear from the order for reference that @1 distributes the loyalty rewards to the customers.

49 It must therefore be held that, in the main proceedings in the present cases, the redeemers supplied to the customers goods, within the meaning of Article 5(1) of the Sixth Directive, and, in Case C-53/09, also supplied to them services, within the meaning of Article 6(1) of that directive.

50 In the second place, it is necessary to establish whether those transactions have been carried out for consideration.

51 In that regard, it follows from the case-law that a supply of goods or services 'for consideration', within the meaning of Article 2.1 of the Sixth Directive, presupposes the existence of a direct link between the goods or service provided and the consideration received (see, inter alia, in relation to supplies of services, Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 12).

52 In order to examine whether there is consideration and, if so, whether there is a link between that consideration and the goods or service provided, it must be observed that the price which the customers pay to the sponsors for goods and services in Case C-53/09 and to Baxi for goods in Case C-55/09 is the same amount whether those customers participate in the loyalty rewards schemes or not.

53 In that context, it should be borne in mind that, in relation to a loyalty rewards scheme whereby an oil company handed over goods to purchasers of fuel in exchange for points which those purchasers had obtained, the number dependent on the quantity of fuel purchased, by paying the retail price at the pump, the Court held that the oil company could not reasonably maintain that the price paid by the purchasers of fuel in fact contained an element representing the value of the points or the goods supplied in exchange for those points because the fuel purchaser, whether he took the points or not, had to pay the same retail price (see, to that effect, Case C-48/97 *Kuwait Petroleum* [1999] ECR I-2323, paragraph 31).

54 The Court held that the sale of fuel giving rise to the award of points to customers, on the one hand, and the supply of goods in exchange for those points, on the other hand, were two separate transactions (see, to that effect, *Kuwait Petroleum*, paragraph 28).

55 It thus follows that, in the main proceedings in the present cases, the sale of goods and the supplies of services giving rise to the award of points to customers, on the one hand, and the supply of loyalty rewards in exchange for those points, on the other hand, are two separate transactions.

56 However, as the United Kingdom Government points out, it is not a requirement of the Sixth Directive that, for a supply of goods or services to be effected 'for consideration', within the meaning of Article 2.1 of that directive, the consideration for that supply must be obtained directly from the person to whom those goods or services are supplied. Article 11.A(1)(a) of that directive provides that the consideration may be obtained from a third party.

57 In that regard, it is evident from the order for reference in Case C-53/09 that the exchange of points by the customers with the redeemers gives rise to the making of a payment by LMUK to those redeemers. The amount of that payment is the sum total of the charges, which are of a fixed amount for each point redeemed against all or part of the price of the loyalty reward. In that context, it must be considered that, as maintained by the United Kingdom Government, that payment corresponds to the consideration for the supply of the loyalty rewards.

58 In Case C-55/09, it is also evident from the order for reference that the loyalty rewards are invoiced by @1 to Baxi at the retail sale price with the addition of the delivery costs applicable at the order point where ownership is transferred and points are redeemed. Accordingly, after deduction of @1's profit margin consisting of the difference between the retail sale price of the loyalty rewards and the purchase price at which @1 acquired those rewards, the payment by Baxi to @1 constitutes the consideration for the supply of those rewards.

59 In Case C-55/09, Baxi claims, however, that the consideration for the payment does not correspond to a supply of goods, but to a complex advertising service under which the supply of loyalty rewards to customers is one of a number of services.

60 In that regard, it is clear from the Court's case-law that, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of goods or services (see, to that effect, Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 21 and case-law cited).

61 It is evident from the order for reference in Case C-55/09 that the payments made by Baxi to @1 correspond to the retail sale price of the loyalty rewards with the addition of the costs of packaging and delivery and, that, accordingly, @1 obtains a profit margin consisting of the difference between the retail sale price of the loyalty rewards and the purchase price at which @1 acquired those rewards.

62 Accordingly, as is, moreover, acknowledged by both the United Kingdom Government and the Commission, a payment such as that at issue in the main proceedings in Case C-55/09 can be divided into two elements, each of which corresponds to a separate service.

63 Consequently, the purchase price constitutes the consideration for the supply of loyalty rewards to the customers, whereas the difference between the retail sale price, paid by Baxi, and the purchase price paid by @1 in order to acquire the loyalty rewards, namely the profit margin, constitutes the consideration for the services which @1 supplies to Baxi.

64 By contrast, in Case C-53/09, LMUK has, in both its written and oral observations, asserted that the payments which it makes to the redeemers are not the consideration for two or more separate services. It is, however, for the referring court to determine whether that is the case.

65 In the light of the foregoing, the answer to the questions referred is that, in relation to a customer loyalty rewards scheme such as those at issue in the cases in the main proceedings, Articles 5, 6, 11.A(1)(a) and – in the version resulting from Article 28f(1) – 17(2) of the Sixth Directive must be interpreted as meaning that:

– payments made by the operator of the scheme concerned to redeemers who supply loyalty rewards to customers must be regarded, in Case C-53/09, as being the consideration, paid by a third party, for a supply of goods to those customers or, as the case may be, a supply of services to them. It is, however, for the referring court to determine whether those payments also include the consideration for a supply of services corresponding to a separate service; and

– payments made by the sponsor to the operator of the scheme concerned who supplies loyalty rewards to customers must be regarded, in Case C-55/09, as being, in part, the consideration, paid by a third party, for a supply of goods to those customers and, in part, the consideration for a supply of services made by the operator of that scheme for the benefit of that sponsor.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the referring court, the decisions on costs are 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 (Second Chamber) hereby rules:

In relation to a customer loyalty rewards scheme such as those at issue in the cases in the main proceedings, Articles 5, 6, 11.A(1)(a) and – in the version resulting from Article 28f(1) – 17(2) 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 95/7/EC of 10 April 1995, must be interpreted as meaning that:

– **payments made by the operator of the scheme concerned to redeemers who supply loyalty rewards to customers must be regarded, in Case C-53/09, as being the consideration, paid by a third party, for a supply of goods to those customers or, as the case may be, a supply of services to them. It is, however, for the referring court to determine whether those payments also include the consideration for a supply of services corresponding to a separate service; and**

– **payments made by the sponsor to the operator of the scheme concerned who supplies loyalty rewards to customers must be regarded, in Case C-55/09, as being, in part, the consideration, paid by a third party, for a supply of goods to those customers and, in part, the consideration for a supply of services made by the operator of that scheme for the benefit of that sponsor.**

[Signatures]

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* Language of the cases: English.
