

CASE C-300/12 *IBERO TOURS GMBH*, EUROPEAN COURT OF JUSTICE

(UNREPORTED, JUDGMENT OF 16TH JANUARY 2014)

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Taxable amount – Articles 11A(1)(a) and 11C(1) of the Sixth VAT Directive – granting of price discounts to end customers – neutrality of VAT – Elida Gibbs - did the granting of discounts by an intermediary to end customers reduce the taxable amount of the intermediary services which it provided to its principal?

Introduction

In *Ibero Tours*, the Court of Justice was asked by the German Federal Finance Court to give guidance on the VAT treatment of discounts. The discounts were given by an intermediary on supplies of services by its principal to end customers. The Court of Justice was in particular asked to consider whether its previous decision in Case C-317/94 *Elida Gibbs* [1996] ECR I-5339 applied, so that the discounts given by the intermediary to the end customer served to reduce the consideration for the intermediary's agency services supplied to its principal.

Facts

Ibero Tours was a travel agent which acted as an intermediary between tour operators and their customers. The tour operators organised the package holidays in question. The customers entered into contracts directly with the tour operators to purchase the holidays.

The tour operators' services fell within the special scheme established by Article 26 of the Sixth VAT Directive (now Articles 306-310 of the Principal VAT Directive ("PVD")). Under that

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scheme, tour operators are only required to account for VAT on their margin.

The end customers paid Ibero as the tour operators' agent. In turn, Ibero was responsible for paying the whole of the brochure price of the holidays to the tour operators. In exchange for Ibero finding customers for their holidays, the tour operators agreed to pay Ibero a commission for each holiday which it sold. That commission fell outside the special tour operators' margin scheme, by virtue of the express exclusion in Article 26 of the Sixth Directive (now Article 306 PVD) for intermediary services.

In order to simplify the relevant payments, Ibero netted off the amounts which it paid to the tour operators, accounting to them for the difference between the full brochure price and its commission.

However, in order to attract customers and thus earn greater commission from the tour operators, Ibero gave its own discounts to customers on the tour operators' full brochure price. The discounts were given at Ibero's discretion and were not funded by the tour operators. So, to use an example which was discussed in the hearing before the Court of Justice, if the full list price of a holiday was €2000, Ibero would have been entitled to a commission of €232 (including €32 in VAT). If Ibero gave the customer a €60 discount, he or she would have paid €1940 to Ibero. Since Ibero was still required to pay €2000 to the tour operator, the economic effect of the discount was equivalent to a €60 reduction in Ibero's commission from €232 to €172.

The Issue

The issue for the Court of Justice was whether the discount reduced the taxable amount of Ibero's intermediary service to the tour operators of attracting clients for their holidays. Was Ibero required to account to the German tax authorities for the full €32 in VAT on €200 in commission? Or was it entitled to treat its commission as reduced by the €60 discount from €232 to €172 and thus reduce the VAT element by €8.28 from €32 to €23.72?

In order to answer this question, the Court of Justice had to provide guidance on Article 11A(1)(a) of the Sixth VAT Directive (which is now Article 73 PVD). That provision stated that the taxable amount included everything which constituted the consideration which has been or is to be obtained by the supplier from the purchaser. Article 11C(1) of the Sixth VAT Directive (now Article 90 PVD) went on to provide that "where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly

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under conditions which shall be determined by the Member States”.

The Court of Justice’s previous judgment in *Elida Gibbs*

Both Ibero and the Commission argued that the principles established by the Court of Justice in its previous judgment in *Elida Gibbs* applied, so that the discount which Ibero gave to the end customer should be used to reduce the taxable amount of the intermediary services supplied by Ibero to the tour operators.

In *Elida Gibbs*, a manufacturer issued promotional coupons which entitled end customers to a reduction in the purchase price of goods. Some of the coupons could be redeemed with retailers in the supply chain. Others had to be redeemed by the customer directly with the manufacturer. The issue in *Elida Gibbs* was whether the reimbursement of the coupons by the manufacturer constituted a retroactive discount which served to reduce the taxable amount for the relevant goods pursuant to Articles 11(A)(1)(a) or 11(C)(1) of the Sixth VAT Directive.

The Court of Justice held in *Elida Gibbs* that the taxable amount had to be reduced by the value of the coupons. It based this conclusion on the principle of neutrality, which it described as being the principle under which “similar goods should bear the same tax burden whatever the length of the production and distribution chain”. It went on to explain that the tax authorities “may not in any circumstances charge an amount exceeding the tax paid by the final consumer”. This would have been the case if the manufacturer, as “the first link in a chain of transactions which ends with the final consumer”, was required to account for VAT on the full price of the goods without taking into account the discount given through redemption of the coupons.

Ibero argued that the principles laid down in *Elida Gibbs* required it to be taxed on the commission paid by the tour operator less the discount which it gave to the end customer, since otherwise it would be taxed on a higher sum than the remuneration which it actually received. To go back to the example given above, it argued that it had only received €172 in remuneration for its services and thus it should only account for €23.72 in VAT. Ibero argued that to require it to account for €32 in VAT would mean that the amount of VAT collected by the tax authorities would be higher than that paid by the end customer – since the end customer would have paid €267.59 in VAT on a discounted ticket price of €1,940, whereas the tour operator would have received a net payment of €1,768 (€2,000 less commission of €232) of which €243.86 would have been VAT. If

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Ibero was required to pay €32 in VAT, the total VAT collected by the authorities would be €275.86, which was €8.27 more than the amount paid by the end customer. However, if the discount was taken into account in calculating the taxable amount of Ibero's services, the amount received by the tax authorities would match the amount paid by the end customer, since the tour operator would account for €243.86 and Ibero would account for €23.72 in VAT on its net commission of €172.

The European Commission agreed with Ibero that the principles in *Elida Gibbs* applied. It argued that Ibero, as an intermediary, was just as much part of the "value chain" in the supply of the holiday by the tour operator to the end customer as the chain of manufacturer, wholesaler, retailer and end customer in *Elida Gibbs*. The principle of neutrality required the deduction of the discount from the taxable amount, since otherwise a discount (such as the €60 discount in the example set out above) would be treated differently when granted by the tour operator rather than by its agent. In the former situation, the discount would serve to reduce the taxable amount (for the holiday), whilst (on the argument of the German tax authorities) it would not serve to reduce the taxable amount of the intermediary's commission.

In his Opinion, Advocate General Wathelet expressed the view that there was no reason not to apply the *Elida Gibbs* principles in the *Ibero* case. In his view, the discount offered by Ibero to the end customer was in economic terms the same as if Ibero had accepted a reduced commission from the tour operator. He agreed with Ibero and the Commission that, unless the taxable amount of Ibero's services was reduced to take account of the discount, Ibero would be forced to pay a greater sum in VAT to the German tax authorities than was in fact paid by the end customer, contrary to the principle of neutrality.

The Court's Judgment

The Court of Justice disagreed with the analysis offered by Ibero and the Commission, as well as with the Advocate General's Opinion. Instead, it preferred the submissions made by Germany and the United Kingdom. They had pointed out that the relationships involved in *Ibero Tours* were different from those in *Elida Gibbs*. In *Elida Gibbs*, there was a single "value chain" under which the same goods were supplied by a manufacturer through wholesalers and retailers to end customers and the manufacturer had offered discounts to the end customers by way of vouchers.

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By contrast, in *Ibero Tours*, there were two different chains of supply. Ibero's intermediary services did not form part of the distribution chain for the tour operator's holidays. The intermediary services essentially involved the travel agent (Ibero) in introducing customers to the tour operator. The tour operator did not re-supply those services on to the end customers, but instead used them as an overhead of its business of supplying holidays.

Germany and the UK argued that Ibero's contribution towards the price of the end customer's holiday formed part of the consideration given by the customer for the holiday. It was not a discount on the price of Ibero's intermediary services, which were supplied to the tour operator alone and not resupplied to the end customer. Therefore, the consideration for Ibero's intermediary services was the whole of the commission provided to it by the tour operator (in the example, the whole €232).

The Court of Justice agreed. It held that the fact that Ibero financed the discount from a part of its commission had no impact on the price of the services provided by Ibero to the tour operator. Therefore, its commission was still €232, regardless of whether it decided to use part of that commission to fund a €60 discount to the end customer.

The Court of Justice held that the principles established in *Elida Gibbs* did not affect the determination of the taxable amount in Ibero's case, since the tour operator was not at the head of a chain of operations, as it provided its services directly to the end customer. Ibero's intermediary service was totally separate from the holiday service which were provided by the tour operator directly to the end customer. In those circumstances, Ibero's financing of part of the price of the holiday "affects neither the consideration received by the tour operator for the sale of that travel nor the consideration received by Ibero Tours for its intermediation service. Accordingly, pursuant to Article 11A(1)(a) of the Sixth Directive, such a price reduction does not lead to a reduction of the taxable amount either for the principal transaction or for the supply of services by the travel agent".

Conclusion

The Court of Justice's judgment in *Ibero* is a reminder that the VAT analysis of a transaction is not necessarily identical to the economic analysis – and also that the economic analysis can itself be a matter of debate.

The trend recently has been for the Court to adopt an economic approach when analysing VAT issues, following on from its statement at paragraph 39 of its judgment in Joined Cases C-53/09 and C-55/09 *LMUK and Baxi* [2010] ECR I 9187 that “consideration of economic realities is a fundamental criterion for the application of the common system of VAT”. That principle has been applied in determining the place of supply (Case C 260/95 *DFDS* [1997] ECR I 1005 at paragraph 23 and Case C 73/06 *Planzer Luxembourg* [2007] ECR I 5655 at paragraph 43) and in identifying the person by whom and to whom goods and services are supplied (Case C 185/01 *Auto Lease Holland* [2003] ECR I 1317, Case C-653/11 *Newey*, judgment of 20th June 2013, as well as *LMUK and Baxi* itself).

In *Ibero*, the Court has rejected a simple economic analysis in determining the taxable amount, which focused on the net amount left to the travel agent after it deducted the discount which it gave to the end customer from the commission which it earned from the tour operator. The Court has instead preferred an analysis based on the legal obligations entered into between the tour operator, travel agent and end customer. The decision is also explicable on economic grounds, to the extent that it recognised the fact that *Ibero* offered the discount not to the tour operator but to the tour operator’s end customer. The tour operator recovered input tax on the full cost of *Ibero*’s intermediary services and therefore, in logic, *Ibero* had to account for output tax on the full commission too.

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Raymond Hill was counsel for the United Kingdom in the *Ibero* case. Philip Moser QC, also of Monckton Chambers, represented *Ibero* Tours.

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