

BETWEEN:

LEBARA LTD

Appellant

-and-

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

**SCHEDULE TO ORDER FOR
REFERENCE TO THE COURT OF
JUSTICE OF THE EUROPEAN UNION**

INTRODUCTION

1. This reference for a preliminary ruling has been made in the context of an appeal to the First-tier Tribunal (Tax Chamber) ("the Tribunal") brought by Lebara Limited ("Lebara") against a Notice of Assessment whereby the Respondents ("HMRC") required Lebara to pay value added tax ("VAT") to HMRC in respect of supplies of telecommunications services made by Lebara in March 2005. HMRC have issued a number of other Notices of Assessment for later periods to September 2008, which Lebara has also appealed. The appeals against those other Notices of Assessment have been stayed pending the outcome of the appeal against the Notice of Assessment for March 2005.

THE APPELLANT

2. The Appellant is Lebara Limited, a company established in the United Kingdom, represented in these proceedings by its in-house legal team with an address for service at Second Floor, 25 Copthall Avenue, London, EC2R 7BP (ref. Sandy Macherla and Paul Van Straaten, Tel. + 44 20 30363000, email sandy.macherla@lebara.com and Paul.VanStraaten@lebara.com). Counsel for the Appellant are Paul Lasok QC and Mario Angiolini.

THE RESPONDENTS

3. The Respondents are the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"). They are responsible for the administration and collection of VAT in the United Kingdom. The Commissioners are represented in these proceedings by the Solicitor for the Commissioners for HM Revenue and Customs, 2nd Floor South, Bush House, Strand, London WC2B 4RD, (ref: Myles Hothersall Tel. + 44 207 438 8466, email myles.bothersall@hmrc.gsi.gov.uk). Counsel for the Commissioners are Philippa Whipple QC and Suzanne Lambert.

THE APPEAL

4. The appeal gives rise to a number of issues concerning the meaning and effect of the Sixth VAT Directive (Directive 77/388). So far as concerns the appeals pending before the Tribunal that relate to periods between 1 January 2007 and September 2008, the same issues arise in connection with the meaning and effect of Directive 2006/112.
5. In general terms (and without prejudice to the more detailed description of the facts of the case set out below), those issues of interpretation arise in relation to a situation in which a taxable person ("Trader A") carries on business in one Member State ("Member State A") and supplies to a taxable person in another Member State ("Trader B" and "Member State B"), for consideration paid by Trader B, a "phonecard" (that is, a physical object containing information that enables the holder to make telephone calls up to a value stated on the phonecard). The phonecard is sold on by Trader B to a purchaser in Member State B for consideration provided by the purchaser. At some point, the phonecard is bought by a person in Member State B who then uses it to make telephone calls to destinations outside the EU ("the End User"). The only payment made by the End User is to the trader that has supplied him/her with the phonecard and no payment is made by the End User to Trader A. The calls are put through local providers of telephony with whom Trader A has contracted, to a switch located in Member State A and owned and operated by Trader A, and they are then routed to their final destination by one or more providers of international telephony with whom Trader A has contracted.

6. In general terms, the questions of EU law arising from that situation are: (i) whether the phonecards give rise to two separate supplies for consideration by Trader A, one upon sale of the card by Trader A to Trader B and one upon use of the card by the End User; (ii) whether the provision of telecommunications services to the End User is a taxable supply, for VAT purposes, for which the place of supply is in Member State A; and, if so, (iii) whether Member State A can or should charge VAT on the provision of telecommunications services to the End User, when VAT is payable in Member State B on the sale of the card to Trader B under the reverse charge mechanism.
7. The context in which the questions arise is that some Member States adopt different practices in relation to the VAT treatment of such phonecards. In consequence there is a risk of double taxation which arises when the supply by Trader A to Trader B is taxed in Member State B under the reverse charge mechanism while, at the same time, the use of the card by the End User is treated as a supply in Member State A. There is a risk of non taxation if Member State B does not apply the reverse charge mechanism and also does not apply VAT to supplies of the cards within Member State B and if, at the same time, Member State A does not treat the use of the card by the End user as a supply in Member State A.

SUMMARY OF THE RELEVANT FACTS

8. Lebara is a company established in the United Kingdom which provides telecommunications services.
9. At the material time, Lebara had entered into contracts with taxable persons established in various other Member States of the EU ("Distributors"). Under those contracts ("the Agreements with Distributors"), the Distributor agreed to act as a non-exclusive distributor of a prepaid telephone calling service (operated by using a phonecard to access Lebara's network in order to make telephone calls) that the Distributor agreed to purchase from Lebara and resell.
10. Under the Agreements with Distributors, the Distributor agreed to place orders with Lebara for phonecards, which were sold by Lebara to the Distributor at a

- price stated in the Agreement. The Distributor resold the phonecards on its own behalf and not as agent of Lebara.
11. The phonecards were sold exclusively or almost exclusively to End Users in the Distributor's Member State, either directly by the Distributor or via other taxable persons in that Member State who acted as intermediaries (for example, wholesalers or retailers).
 12. Under the Agreements with Distributors, the Distributor was responsible for the marketing of the phonecards but was required to submit its marketing plan to Lebara for Lebara's approval and could not use any promotional material that referred to any Lebara service without first obtaining Lebara's approval.
 13. Distributors would request Lebara to design and prepare the phonecards and marketing posters to be distributed by them. Lebara prepared phonecards in liaison with the distributor. Lebara and the distributor would agree the calling time, destinations and branding to be made available to the End User. As a rule, the phonecards were sold under the name of the relevant Distributor or a name chosen by the Distributor. Some phonecards however did bear Lebara's name and branding. In the majority of cases where the phonecards bore the Lebara brand, the cards were being distributed by companies which used the name of Lebara but were totally independent companies acting solely as "distributors", such as Lebara Sweden. Neither Lebara itself nor any Lebara group company sold any phonecards to the End Users. Distributors would wish to target telephone calls going to a particular geographical destination. Lebara would provide the rates and numbers of minutes for that destination for them to approve.
 14. Lebara had entered into local service provider agreements with telecommunications service providers in the Member States in which its phonecards were distributed. Pursuant to those agreements, the provider provided a dedicated local number or series of local numbers within the Member State in question. Those numbers gave access to the local telecommunications network, which routed a call made using the phonecard to Lebara's switch in the UK. Under those contracts, each party acted on its own account and not on behalf of or as agent of the other.

15. Lebara leased a switch located in the United Kingdom on which was installed its own customised software.
16. Lebara had also entered into International Carrier Agreements with telecommunications service providers, pursuant to which the provider gave Lebara access to the provider's international telecommunications network and thereby routed calls from Lebara's switch in the UK to the caller's destination. Under those contracts, each party acted on its own behalf and not as agent of the other.
17. The physical features of the phonecards sold by Lebara to the Distributors and resold by the latter were as follows:
 - a. The phonecards were plastic and about the same size and shape as a credit card.
 - b. The front of the phonecard bore a brand name which in most cases was selected by the Distributor and a face value expressed in the currency of the Distributor's Member State (usually Euros).
 - c. The front of the phonecard might also (but did not always) bear a slogan (such as "call the world") and/or an indication of a country or countries outside the EU to which a call might be made.
 - d. The reverse of the phonecard set out how the phonecard was to be used and one or more local access numbers to use in order to make an international telephone call. The phonecards could be used to telephone anywhere outside Europe.
 - e. The reverse of the phonecard also bore a serial number unique to the phonecard and a panel containing a PIN number. The PIN number was concealed. When the phonecard was acquired by an End User, the End User scratched off the coating covering the panel in order to reveal the PIN number.
 - f. The reverse of the phonecard also bore a customer service number which the End User could contact in case of any problem with the phonecard.

18. Lebara sold the phonecards to the Distributors for less than the face value of the phonecard. Lebara did not know and had no control over the price charged by the Distributors or other taxable persons in the supply chain leading to the End User.
19. When the phonecards were sold to a Distributor, they were inactive and could not be used. The Distributor would ask Lebara to activate the phonecards, indicating by reference to the serial number of the phonecards which ones were to be activated. Lebara would activate the phonecards if the Distributor's account with Lebara was in credit or would otherwise request a payment from the Distributor before activating them.
20. Once activated, the phonecard could be used. The holder would use it by telephoning the local access number printed on the back of the phonecard. The call would be picked up by the local service provider on its telecommunications network and routed to Lebara's switch. Lebara's automated system would prompt the holder to enter the PIN number (revealed by scratching off the coating of the concealed panel on the back of the phonecard). After the PIN number had been authorised by the automated system, the holder dialled the international number that he or she wished to call. Lebara's switch would know which tariff to apply to the call once the destination number had been dialled. Before the call was connected to the destination number, the automated system would inform the caller about the maximum calling time available based on the credit available on the phonecard and the destination number dialled.
21. The only payment made by the End User was to the retailer supplying him with the phonecard. No additional money was paid by the End User to Lebara.
22. The End User did not need to have the phonecard in order to make a telephone call. It was sufficient to have the information contained on the back of the phonecard (most importantly, the PIN number).
23. The phonecards could be used to make telephone calls for a limited period of time (ranging from 10 to 60 days) starting from the date of first use of the

phonecard. Any unused credit on the phonecard at the end of the period of validity of the card would not be reimbursed to the End User.

24. The End User could ring a customer service number printed on the back of the phonecard if there were any problems with the phonecard. For the majority of countries customer services were provided by the Distributor in the first instance with the Distributor having access to Lebara if necessary. Otherwise, Lebara and the Distributor agreed that customer services would be provided by Lebara directly to End Users. Only Lebara was able to rectify problems with the service (if instructed by the distributor or previously agreed with him). Only Lebara was able to recredit the card if so requested.
25. The phonecards gave the holder a right to make telephone calls up to the face value stated on the phonecard. The only use to which the phonecards could be put was the making of telephone calls. They could not be used to obtain any other service.
26. The phonecards were targeted at persons in ethnic minority communities in the Member State of the Distributor who wished to make international calls.
27. Lebara's business model was to sell phonecards to Distributors. From Lebara's perspective, the predominant purpose of the phonecards was the making of international telephone calls in the ethnic sector. A retailer could have sold phonecards to anyone, and Lebara did not know the identity of the End User or the capacity, business or private, in which an End User made a telephone call. It is probable (but cannot be verified) that the greater part of the use of the phonecards by End Users was a non-business use.
28. Lebara had systems in place which enabled it to track the use of each and every phonecard that it had sold. Lebara's systems enabled it to identify: whether the phonecard was blocked and / or when it was unblocked; whether the phonecard had been activated; whether the phonecard was within its period of validity; the extent to which the phonecard had been used; the credit outstanding on that phonecard; the number from which calls had been made using that phonecard; and the numbers which had been called using that phonecard. No distributor or other person had access to those systems.

THE DISPUTE BETWEEN LEBARA AND HMRC

29. Lebara did not account to HMRC for VAT on its sales of phonecards to Distributors on the ground that the sale of the phonecards was the supply of a right to receive telecommunications services made to its Distributors. It is not in dispute that the place of supply of those transactions was in the Member State in which the Distributor was established, pursuant to Article 9(2)(e) of the Sixth Directive, as in force at the relevant time.
30. HMRC contend that the phonecards are face value vouchers. The VAT treatment of face value vouchers is not harmonised by EU legislation and Member States take different views about how they should be treated for VAT purposes. The phonecards represent at least two potential supplies for VAT purposes made by Lebara: the first ("issue") is at the point of sale of the phonecard to the Distributor (which is the supply of a right to receive telecommunications services), and the second ("redemption") is when the phonecard is used by the End User to obtain telephony from Lebara.
31. Accordingly, HMRC contend that Member States have a legitimate policy choice as to how to tax the phonecards.
32. In the UK, the issue of the phonecards is not subject to VAT because paragraph 4(2) of Schedule 10A to the Value Added Tax Act 1994 provides: "The consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher". It is common ground that the phonecards are a "retailer voucher" within the meaning of that provision and that the consideration for the issue of the phonecards by Lebara to the Distributors did not exceed the face value of the voucher.
33. Schedule 10A does not contain any provision dealing with redemption. Therefore, according to HMRC, the provision of telephony by Lebara to the End User was a taxed supply in accordance with the basic provisions of the Value Added Tax Act 1994.

34. HMRC contends that Lebara is obliged to account to HMRC for VAT on the value actually received for the services supplied by it at the point of redemption. That value is calculated by reference to that part of the consideration received by Lebara from the Distributor which represents the use actually made of the phone card by the End User (thus, if the End User used only 90% of the face value of the phonecard, Lebara is to pay VAT on 90% of the consideration received by it from the Distributor).

35. Lebara contends that the place of supply of the phonecards was in the Member State in which the Distributor was established. VAT was therefore to be paid in that Member State by the Distributor under the reverse charge mechanism. Thereafter, the phonecards were supplied subject to VAT in that Member State. The redemption of the phonecard does not involve a supply by Lebara to the End User. Further, the imposition of VAT in the United Kingdom on the redemption of the phonecard involves double taxation and is therefore unlawful.

THE QUESTIONS REFERRED

36. In the light of the matters referred to above, the Tribunal considers that it is necessary to decide contested matters of EU law in order to rule on the appeal before it and that, in the circumstances, it is appropriate to refer the following questions to the Court of Justice for a preliminary ruling:

In circumstances such as those of the present case:

- 1) Where a taxable person ("Trader A") sells phonecards representing the right to receive telecommunications services from that person, is Article 2(1) of the Sixth VAT Directive to be interpreted so as to mean that Trader A makes two supplies for VAT purposes: one at the time of the initial sale of the phonecard by Trader A to another taxable person ("Trader B") and one at the time of its redemption (i.e. its use by a person - "the End User" - to make telephone calls)?
- 2) If so, how (consistently with EU VAT legislation) is VAT to be applied through the chain of supply where Trader A sells the phonecard to Trader B, Trader B resells the phonecard in Member State B and it is eventually purchased by the End

User in Member State B, and the End User then uses the phonecard to make telephone calls?