JUDGMENT OF THE COURT (Sixth Chamber)

19 June 2003 *

In Case C-149/01,

REFERENCE to the Court under Article 234 EC by the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Commissioners of Customs & Excise

and

First Choice Holidays plc,

on the interpretation of Article 26(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),

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting as President of the Sixth Chamber, C. Gulmann (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— First Choice Holidays plc, by K. Prosser QC, instructed by M. Whitehouse, solicitor,

— the United Kingdom Government, by R. Magrill, acting as Agent, and P. Sales, Barrister,

— the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,

— the Commission of the European Communities, by R. Lyal, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of First Choice Holidays plc, represented by K. Prosser, of the United Kingdom Government, represented by P. Ormond, acting as Agent, assisted by P. Sales, and of the Commission, represented by R. Lyal, at the hearing on 14 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2002,

gives the following

Judgment

1 By decision of 13 March 2001, received at the Court on 26 March 2001, the Court of Appeal (England and Wales) (Civil Division), referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 26(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, hereinafter 'the Sixth Directive').

2 Those questions were raised in proceedings between the Commissioners of Customs & Excise (hereinafter 'the Commissioners'), who are responsible for the collection of value added tax (hereinafter 'VAT') in the United Kingdom, and First Choice Holidays plc (hereinafter 'First Choice Holidays'), a tour operator, relating to a claim submitted by the latter for repayment of VAT.

Legal background

3 Article 11A(1)(a) of the Sixth Directive provides:

'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 Article 26(1) and (2) of the Sixth Directive, entitled 'Special scheme for travel agents' provides:

'1. Member States shall apply value added tax to the operations of travel agents in accordance with the provisions of this Article... In this Article travel agents include tour operators.

2. All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller.... The taxable amount and the price exclusive of tax, within the meaning of

Article 22(3)(b), in respect of this service shall be the travel agent's margin, that is to say, the difference between the total amount to be paid by the traveller, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller.'

5 Article 26 of the Sixth Directive was implemented in the United Kingdom by Section 53 of the Value Added Tax Act 1994 and by the Value Added Tax (Tour Operators) Order 1987. The provisions of national law were supplemented by the Commissioners' Leaflet 709/5/88 entitled 'Tour Operator's Margin Scheme' (TOMS).

The main proceedings and the questions referred for a preliminary ruling

6 First Choice Holidays organises package holidays by combining various component elements which it buys. It leaves travel agents to sell the final product to customers under agency agreements.

7 The agency agreements between First Choice Holidays and the travel agents contain no provision concerning the price at which the agents may sell the holidays. The travel agents are free to sell them at prices below the prices published in First Choice Holidays' brochures. Travel agents routinely grant discounts on holidays without obtaining prior agreement in each case from First Choice Holidays.

8 However, the agency agreements provide that First Choice Holidays is to receive from the agent the full price appearing in the brochure and that the agent is to receive a commission equal to a given percentage, usually 10% of that price.

9 In a case where the full price is GBP 1 000 and the agent gives the customer a discount of GBP 50, the customer will have to pay GBP 950 to First Choice Holidays. In practice, First Choice Holidays will receive the GBP 950 through the travel agent who will have to pay First Choice Holidays GBP 50 in addition, corresponding to the difference between the price indicated in the brochure and that in fact charged. The agent will also charge First Choice Holidays a commission of GBP 100, that is 10% of the brochure price.

10 When a holiday was sold, First Choice Holidays drew up a 'customer invoice' which it sent to the agent. The copy intended for the customer indicated the price of the holiday appearing in the brochure, but said nothing about any discount or commission. When the agent forwarded the invoice to the customer, he either sent a statement showing the actual holiday cost, after deduction of the discount, or made a manual amendment to the invoice to show this actual price. First Choice Holidays frequently did not know the amount of any discount and therefore did not know the amount actually paid by the customer.

11 In 1998, First Choice Holidays submitted a claim to the Commissioners for the repayment of GBP 921 456, on the basis that it had incorrectly accounted for VAT in respect of the discounts given by travel agents when selling its holidays.

12 The Commissioners rejected that claim.

13 First Choice Holidays appealed against that decision to the VAT and Duties Tribunal, London. By a decision of 22 November 1999, the Tribunal held the appeal to be admissible and well founded. It held that the payment made by the travel agents in respect of the difference between the brochure price and the reduced price fell outside the scope of the scheme provided for by Article 26 of the Sixth Directive.

14 The Commissioners appealed against the Tribunal's decision to the High Court of Justice of England and Wales, Chancery Division. By a decision of 28 June 2000, the High Court held that Article 26 of the Sixth Directive did not apply, in the above example, to the GBP 50 payable by the travel agent because it was not an amount 'to be paid by the traveller'. It held that in any event that sum could fairly be regarded either as payment for the holiday or as payment for a service provided by First Choice Holidays to the travel agent consisting in providing him with the facility of selling the holiday at whatever price he saw fit. Observing that the VAT and Duties Tribunal, London, had treated the payment as the latter, it held that this was a finding of fact which ought not to be disturbed on appeal.

15 The Commissioners appealed against that decision of the High Court of Justice of England and Wales, Chancery Division, to the Court of Appeal (England and Wales) (Civil Division). They submitted that in the above example the additional GBP 50 paid by the travel agent to First Choice Holidays on behalf of the customer or for his direct benefit amounted to part of the total consideration received by the tour operator, paid by a third party, such that that sum had to be taken into account for the purposes of calculating the VAT.

16 The Court of Appeal, Civil Division, taking the view that the resolution of the dispute before it depended on the interpretation of the Sixth Directive, decided to

stay proceedings and to refer to the Court for a preliminary ruling the following questions:

'Where a tour operator within the meaning of Article 26 of Council Directive 77/388/EEC,

(a) supplies package holidays to customers through the disclosed agency of a travel agent;

(b) permits the agent to arrange the supply of package holidays at a discount from the price published in the tour operator's brochure (the customer being liable to pay only the discounted price for the holiday);

(c) requires the agent who arranges the supply of a package holiday at a discount not only to pass on to the tour operator the price actually charged to the customer but also to pay to the tour operator an additional sum equal to the discount given to the customer (who is unaware of the financial arrangements between the tour operator and the agent), so that the agent accounts to the tour operator for the full brochure price of the holiday;

(d) agrees to pay the agent a commission based on the brochure price of the holiday, which in practice is paid by set-off against the sums due from the agent as mentioned in (c) above;

(e) does not know whether or not the agent has arranged the sale of a particular holiday at a discounted price, or the amount of the discount;

(f) as between itself and the agent, accounts for the sale of the holiday on the basis that it has been paid the full brochure price of the holiday;

(1) Having established the above facts, how should the additional sum (referred to in (c) above) paid by the travel agent to the tour operator be characterised for the purposes of Article 26(2)?

(2) Does "the total amount to be paid by the traveller" within Article 26(2) include the additional sum referred to in (c) above?'

The questions referred for a preliminary ruling

17 By its two questions, which should be examined together, the national court is essentially asking whether Article 26(2) of the Sixth Directive must be interpreted as meaning that the 'total amount to be paid by the traveller' within the meaning of that provision includes the additional amount that a travel agent, acting as intermediary on behalf of a tour operator, must, in circumstances such as those described in the order for reference, pay to the tour operator on top of the price paid by the traveller and which corresponds in amount to the discount given by the travel agent to the traveller on the price of the holiday stated in the tour operator's brochure.

Observations submitted to the Court

18 First Choice Holidays submits that Article 26 of the Sixth Directive constitutes an exception to the general regime for determining the taxable amount. It is not simply a case of applying the general rules on the taxable amount laid down in Article 11A(1)(a) of that directive, a provision which refers, *inter alia,* to the consideration obtained by the supplier from a third party. The wording of Article 26(2) of the Sixth Directive is markedly different from that of Article 11A(1)(a). The focus is on the traveller and on his relationship with the tour operator. The omission of any reference to a 'third party' cannot be the result of an oversight. That analysis is confirmed by the wording of Article 26(2) of the Sixth Directive, according to which the only costs which may be included in the tour operator's margin are those of 'supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller'. The only costs incurred by the tour operator which can be included in the calculation of the margin are thus the costs of the various ingredients of the package holiday supplied to the customer.

19 Even if the words 'total amount to be paid by the traveller' included an amount paid by a third party, the additional amount paid by the travel agent to the tour operator ought not to be included in the taxable amount. The agent does not act as the representative of the customer, who is only liable to pay the discounted price for the holiday. The only relevant transaction for the purposes of Article 26 of the Sixth Directive is that between the tour operator and the traveller for the supply of package holidays. That article is concerned with the amount charged by the tour operator under that transaction for that supply, not the amount charged under any other transaction for any other supply. Therefore, in so far as the additional amount arises exclusively under a supply of services by the tour operator to the travel agent, as the VAT and Duties Tribunal in London held it did, that amount cannot be included in the tour operator's margin within the meaning of Article 26(2) of the Sixth Directive.

20 Unlike First Choice Holidays, the United Kingdom and German Governments and the Commission consider that the additional amount paid by the travel agent must be included in the 'total amount to be paid by the traveller' within the meaning of Article 26(2) of the Sixth Directive, as consideration paid by a third party, in accordance with the rule laid down in Article 11A(1)(a) of that directive.

The Court's reply

21 Article 26 of the Sixth Directive introduces an exception to the general rules on the taxable amount with respect to certain operations of travel agents and tour operators (Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 5).

22 As an exception to the normal rules of the Sixth Directive, Article 26 must be applied only to the extent necessary to achieve its objective (*Madgett and Baldwin*, paragraph 34).

23 The objective of the special VAT scheme introduced by Article 26 of the Sixth Directive is to adapt the applicable rules to the specific nature of the activity of travel agents and tour operators (Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraph 15, and *Madgett and Baldwin*, paragraph 18).

24 The services provided by such undertakings most frequently consist of multiple services, in particular transport and accommodation, supplied either within or outside the territories of the Member State in which the undertaking has

established its business or has a fixed establishment. The application of the normal rules on place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations (*Van Ginkel*, paragraphs 13 and 14, and *Madgett and Baldwin*, paragraph 18).

25 By laying down a single place of taxation and using as the taxable amount for VAT the travel agent's or tour operator's margin, that is to say the difference between the 'total amount to be paid by the traveller' exclusive of VAT and the actual cost, including VAT, to the travel agent or tour operator of supplies and services provided by other taxable persons, Article 26(2) of the Sixth Directive is designed to avert the difficulties referred to in the previous paragraph and especially to provide a simplified method of deducting input tax, whichever the Member State in which it was collected.

26 The attainment of that objective in no way requires any derogation from the rule laid down in Article 11A(1)(a) of the Sixth Directive which, for the purposes for determining the taxable amount, refers to 'the consideration which has been or is to be obtained by the supplier from the... customer or a third party'.

27 That 'consideration' is the same economic element as the 'total amount to be paid by the traveller' mentioned in Article 26(2) of the Sixth Directive. Under both the general scheme and the special scheme, that element corresponds to the price paid to the supplier of the services. Irrespective of the objective pursued by Article 26(2), the concept in question must have the same legal definition under both schemes.

28 In that context, the words 'to be paid by the traveller' used in Article 26(2) cannot be interpreted literally as meaning that they exclude from the taxable amount for VAT part of the 'consideration' obtained from a third party within the meaning of Article 11A(1)(a).

29 The 'consideration' referred to in Article 11A(1)(a) is the subjective value, that is to say, the value actually received in each specific case (Case C-288/94 *Argos Distributors* [1996] ECR I-5311, paragraph 16, and Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraph 27).

30 The taxable amount for a service is everything which makes up the consideration for the service, and there must therefore be a direct link between the service and the consideration received (see, *inter alia*, Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11).

31 That link must therefore also be present where part of the consideration is obtained from a third party.

32 In circumstances such as those described by the national court, the additional amount paid by the travel agent to the tour operator constitutes a condition of the supply by the tour operator of his services, and the commission due to the travel agent is calculated on the full price of the holiday stated in the brochure.

33 There is therefore a direct link between that additional amount paid by a third party and the supply of the services provided to the traveller. It follows that it is included in the consideration for that supply received by the tour operator and so in the 'total amount to be paid by the traveller' within the meaning of Article 26(2) of the Sixth Directive. It cannot be regarded as the consideration for a service supplied by the tour operator to the travel agent, consisting in providing him with a facility of selling the holiday at a reduced price.

34 The reply to the questions referred for a preliminary ruling must therefore be that Article 26(2) of the Sixth Directive must be interpreted as meaning that the 'total amount to be paid by the traveller' within the meaning of that provision includes the additional amount that a travel agent, acting as intermediary on behalf of a tour operator, must, in circumstances such as those described in the order for reference, pay to the tour operator on top of the price paid by the traveller and which corresponds in amount to the discount given by the travel agent to the traveller on the price of the holiday stated in the tour operator's brochure.

Costs

35 The costs incurred by the United Kingdom and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Court of Appeal (England and Wales) (Civil Division) by decision of 13 March 2001, hereby rules:

Article 26(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 — must be interpreted as meaning that the 'total amount to be paid by the traveller' within the meaning of that provision includes the additional amount that a travel agent, acting as intermediary on behalf of a tour operator, must, in circumstances such as those described in the order for reference, pay to the tour operator on top of the price paid by the traveller and which corresponds in amount to the discount given by the travel agent to the traveller on the price of the holiday stated in the tour operator's brochure.

Schintgen Gulmann Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 19 June 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber