OPINION OF ADVOCATE GENERAL LÉGER

delivered on 30 April 1998 *

1. The High Court of Justice asks the Court for a ruling on whether the special scheme of VAT provided for by Article 26 of the Sixth VAT Directive 77/388/EEC [1] (hereinafter 'the Sixth Directive'), intended for travel agents and tour operators, may apply to a hotelier who, in addition to accommodation, offers his customers travel to and from the hotel and arranges an excursion during the stay, in return for a single payment.

2. The Value Added Tax Tribunal, hearing a point raised for the first time in the High Court of Justice, which remitted the matter to the Tribunal, asks supplementary questions on the method of calculation of the taxable amount, on the assumption that the hotelier comes under the scheme in Article 26.

3. The Value Added Tax Tribunal essentially seeks to know how to compute the taxable amount for such a transaction, the special feature of which is that it includes both accommodation provided by the hotelier from his own resources, which in principle falls within the general system of VAT, and services bought in from third parties for the direct benefit of the traveller, which are services of the type expressly referred to in Article 26.

Legal background

Article 26 of the Sixth Directive

4. Article 26 of the Sixth Directive makes an exception to the general system laid down by that Directive for defining the taxable amount. [2]

* Original language: French.

1 — 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).

2 — The general rules for determining the taxable amount are set out in Article 11(A)(1)(a) of the Sixth Directive, which states that the taxable amount, for most supplies of services, is to consist of 'everything which constitutes the consideration which has been or is to be obtained by the supplier from ... the customer or a third party for such supplies ...'.

5. Article 26 provides as follows:

'1. Member States shall apply value added tax to the operations of travel agents in accordance with the provisions of this Article, where the travel agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. This Article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11(A)(3)(c). 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. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services. 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.

3. If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the travel agent's service shall be treated as an exempted intermediary activity under Article 15(14). Where these transactions are performed both inside and outside the Community, only that part of the travel agent's service relating to transactions outside the Community may be exempted.

4. Tax charged to the travel agent by other taxable persons on the transactions described in paragraph 2 which are for the direct benefit of the traveller, shall not be eligible for deduction or refund in any Member State.'

United Kingdom legislation

6. Article 26 of the Sixth Directive was transposed into United Kingdom law, at the material time, by Section 37A of the Value Added Tax Act 1983 [3] and by the Value Added Tax (Tour Operators) Order 1987.

3 — The corresponding provisions are now contained in Section 53 of the Value Added Tax Act 1994.

7. The detailed provisions of the United Kingdom legislation are set out in Leaflet 709/5/88 of the Commissioners of Customs and Excise of 1 April 1988, entitled 'Tour Operator's Margin Scheme' ('TOMS').

Facts, procedure in the national courts, and questions referred for a preliminary ruling

8. Mr Madgett and Mr Baldwin operate in partnership a hotel, the Howden Court Hotel, in Devon, England. The clientele of the hotel consists of retired and semi-retired people, who generally stay for six or seven days. Ninety per cent of the hotel's customers, most of whom come from the north of England, buy a 'package', that is, pay a fixed price covering (i) half-board accommodation, (ii) transport by coach from various pick-up points in the north of England and (iii) a day excursion by coach. The remaining customers make their own travel arrangements to and from the hotel. They do not go on the sightseeing tour and pay a different price.

9. Mr Madgett and Mr Baldwin obtain the transport services from a third party, under an agreement with a coach hire firm for the whole of the summer season. The coach collects the customers on Saturday at various places in the north of England and takes them back to the same places on the following Friday. The coach can also be used on the Tuesday for a tour of Devon.

10. Mr Madgett and Mr Baldwin always considered that Article 26 of the Sixth Directive did not apply to them, on the ground that they were hoteliers and not tour operators.

11. The Commissioners of Customs and Excise, on the other hand, in notices of assessment for the period from 1 May 1988 to 31 January 1993, considered that Mr Madgett and Mr Baldwin should be taxed on the basis that the tours they provided fell within Article 26 of the Sixth Directive.

Case C-308/96

12. Mr Madgett and Mr Baldwin appealed to the Value Added Tax Tribunal, which held that Article 26 did not apply to them. The Commissioners of Customs and Excise appealed against that decision to the High Court of Justice, which stayed the proceed-

ings and referred the following two questions to the Court for a preliminary ruling:

'1. What are the criteria for determining whether the operations of a taxable person are the operations of a "travel agent" or "tour operator" to which the provisions of Article 26 of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover tax (the Sixth Directive on Value Added Tax) apply? In particular, do the said provisions apply to the operations of a person who, though not a "travel agent" or "tour operator" in the ordinary English meanings of those expressions, provides for the benefit of travellers services of a kind commonly provided by travel agents or tour operators?

2. Having regard to the answer to Question 1, do the said provisions apply to operations of the kind in issue in the present case, where the owners of a hotel in the south of England, as part of their business as hoteliers, offer to customers at a single inclusive charge a week's stay at the hotel, transport by coach between the hotel and points in the north of England, and a local sightseeing trip by coach during their stay at the hotel (the transport elements being bought in by the owners of the hotel from a coach hire company)?'

13. In the proceedings in the High Court Mr Madgett and Mr Baldwin raised a new argument, namely that the method of apportionment prescribed by Leaflet 709/5/88 for determining the tour operator's margin was contrary to the Community rules. The High Court held that it had no jurisdiction to decide the point, as it had not been considered by the Value Added Tax Tribunal and was not therefore the subject of the appeal before the High Court.

Case C-94/97

14. In the reopened proceedings before the Value Added Tax Tribunal Mr Madgett and Mr Baldwin submitted that the national provision requiring the price paid by the traveller to be apportioned on a cost basis between the components of the package bought in from third parties and the components provided by the hotel itself was not consistent with Community law. In their view, Article 26 of the Sixth Directive makes no exception to the rule that the taxable amount for in-house services is to be assessed in accordance with Article 11 of that directive, even if those

services form part of a package which also includes services bought in from third parties.

15. The Commissioners of Customs and Excise submitted for their part that Leaflet 709/5/88 is consistent with the provisions of Article 26 in prescribing that the tour operator's margin is to be calculated on the basis of the actual cost of the services bought in.

16. The Value Added Tax Tribunal thereupon stayed the proceedings pending a preliminary ruling by the Court on the following questions:

'If it is determined in Case C-308/96 that the provisions of Article 26 of the Sixth Directive do apply to operations of the kind in issue in the present case,

1. On the proper interpretation of Article 26, where in a single transaction a tour operator provides a service to the traveller part of which is supplied to the tour operator by other taxable persons ("bought in") and part of which is supplied by the tour operator from its own resources ("in-house"), on what basis is the tour operator's margin to be calculated?

2. In particular, is Article 26 to be interpreted as

(a) requiring the apportionment of the total amount received by the tour operator from the traveller between bought-in and in-house supplies by reference to the costs of the components, or

(b) as authorising Member States to require apportionment by reference to such costs (i) generally or (ii) in the case of operations of the kind in issue in the present case, or

(c) as leaving such apportionment to be made in accordance with the normal principles for determining the taxable amount under Article 11?'

Preliminary remarks

17. It may be of help at this stage, for a better appreciation of the circumstances of the main proceedings and the characteristics of the rules for defining the taxable amount, to explain why Mr Madgett and Mr Baldwin may consider it to be in their interest to remain subject to the general tax scheme of the Sixth Directive rather than the scheme provided for in Article 26.

18. From a strictly mathematical point of view, calculation of VAT by one method or the other leads to the same results. Taxation of the consideration for a service, deducting the input tax paid by the supplier for providing the service, and taxation of the margin on that service give an identical figure for VAT.

19. However, a trader who provides both in-house services which are not part of a package and in-house services which are supplied together with bought-in services for a package price is subject to two different tax schemes. He is then faced with compulsory administrative obligations, since he is required to apportion his turnover between the tax schemes applicable.

The questions referred by the High Court of Justice

20. By its first question the High Court seeks to ascertain whether the special scheme of VAT defined by Article 26 of the Sixth Directive applies to supplies of services by a trader who is not regarded as a travel agent or tour operator by his national law, where those services are of the kind generally supplied by travel agents and tour operators.

21. The Court is thus essentially being asked to define the scope of the concepts of 'travel agent' and 'tour operator'.

22. To interpret the provision, its wording must be examined and the aims of the system set up by the Community legislature identified, in accordance with the Court's settled case-law. [4]

23. The Sixth Directive gives no definition of the terms used, which makes the application

4 — See, for example, Case C-28/95 *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, paragraph 47.

of Article 26 dependent on the content given to those terms by the Member States.

24. Those concepts are Community concepts, however, whose definition may not be left to the discretion of the Member States. [5] Besides, the harmonisation of the laws of the Member States relating to turnover taxes is the principal aim of the Sixth Directive. Consequently, recourse to a formal criterion which made the application of the tax scheme provided for by Article 26 depend on the legal status conferred by each Member State on the traders described as travel agents or tour operators (hereinafter 'travel agents') could jeopardise its uniform application on the territory of the Community. [6]

25. The purpose of the provision makes it possible to identify an interpretation which is in line with the harmonisation required by the Sixth Directive.

26. This was clearly stated by the Court in the *Van Ginkel* judgment:

'The services provided by [travel agents and tour operators] most frequently consist of multiple services, particularly as regards transport and accommodation, either within or outside the territory 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.

In order to *adapt the applicable rules to the specific nature of such operations*, the Community legislature set up a special VAT scheme in Article 26(2), (3) and (4) of the Sixth Directive.' [7]

5 — See, for example, on another Community concept used in the Sixth Directive, 'tax avoidance', Joined Cases 138/86 and 139/86 *Direct Cosmetics and Laughtons Photographs* v *Commissioners of Customs and Excise* [1988] ECR 3937, paragraph 20.

6 — The taxable amount must also be harmonised, according to the ninth recital in the preamble to the Sixth Directive, 'so that the application of the Community rate to taxable transactions leads to comparable results in all the Member States'.

7 — Case C-163/91 *Van Ginkel* v *Inspecteur der Omzetbelasting* [1992] ECR I-5723, paragraphs 13 to 15, my emphasis.

27. The justification for the scheme provided for in Article 26 is thus the specific nature of the operations of travel agents, who supply services provided by other taxable persons who are often located in other Member States. Article 26 is therefore intended to erase the difficulties flowing from the multiplication of administrative formalities resulting from the variety of systems in the different Member States, by defining a single place of taxation and providing for a scheme for taxation of the travel agent's margin. The travel agent is thus released from compliance with certain binding requirements of the tax authorities of other Member States and avoids double taxation, given that tax paid in another Member State may not be deducted and, in the state of Community law at the time of adoption of the Sixth Directive, was difficult to recover.

28. In common with all the Governments which have taken part in the proceedings, and with the Commission, I consider that those reasons militate in favour of the scheme under Article 26 not being limited solely to traders who are formally categorised as travel agents. In my opinion, the concepts in issue should be given a functional meaning, based on the nature of the activities of the trader in question.

29. The special nature of an activity such as that carried on by a travel agent does not cease to exist solely because the trader who contracts with the traveller is not a travel agent, as that term may be defined in the Member State concerned.

30. The concern for simplification shown by the Community legislature applies in the same way with respect to two traders who carry on identical activities and are thus logically confronted with comparable difficulties.

31. That is an expression of the principle of the neutrality of VAT. As the German Government rightly points out, the selective application to similar activities of a system intended to simplify the performance of their tax obligations by the traders concerned would benefit one class of traders for no good reason. The activity of the others would be obstructed by the difficulties resulting from the localisation of the supplies of services.

32. The Court considers that one of the principles of the VAT system is the elimination of factors which may lead to distortions of competition at national and Community level. [8] Those distortions of competition can be avoided if Article 26 is read as covering activities which are comparable according to objective criteria, not according to a predetermined

8 — *Direct Cosmetics*, cited above, paragraph 23.

classification of a trader in one occupational category even if he devotes a substantial part of his activity to the provision of services which fall within another category. [9]

33. The Article 26 scheme must therefore be applied to traders who habitually arrange travel or tours and, in order to supply the services generally associated with activity of that kind, have recourse to other taxable persons.

34. The criteria for identifying traders who carry on the activity of travel agents within the meaning of Article 26 of the Sixth Directive are not easy to define where some of the services offered are provided by the trader himself while others are bought in from third parties. At the hearing it became clear that a hotel could offer its customers services provided by third parties, not part of its activity *sensu stricto*, without it thereby being justified, in my opinion, to class it as a travel agent. That is so where a hotel arranges a taxi service for its customers for journeys to a nearby station or airport.

9 — On the definition, according to objective criteria, of the basis of assessment of VAT, see *Direct Cosmetics*, loc. cit.

35. The criterion used by the German Government, namely that the activity of a trader the object of whose business is not to organise travel or tours does not change its character if the services associated with his activity remain ancillary, is of some help.

36. I consider that a service is ancillary if, first, it contributes to the proper performance of the principal service and, second, it takes up a marginal proportion of the package price compared to the principal service. It does not constitute an object for customers or a service sought for its own sake, but a means of better enjoying the principal service.

37. So that is the case, for example, with transport which a hotel might arrange locally to take its customers to nearby destinations.

38. By contrast, a service may be categorised as a service equivalent to the principal service provided by the trader if its relative share of the total amount paid by the traveller is substantial, so that it cannot be regarded as ancillary, compared with the other services supplied, whether by its price or its value from the customer's point of view. It should be added that to deserve that categorisation the

service must be supplied with a certain frequency, as if it is merely occasional it is in the nature of an ancillary service.

39. Thus where a hotel habitually offers its customers, in addition to accommodation, services such as tourist excursions which are outside the tasks traditionally entrusted to hotels and which cannot be performed without having a substantial effect on the package price charged, it seems to me that the associated services supplied may not be treated as ancillary services. By reason of their existence the activity of the trader then takes on a different character.

40. The trader must in that case be regarded as subject to the provisions of Article 26 of the Sixth Directive, even if under national law he is not considered to be a travel agent or tour operator.

41. The second question from the High Court of Justice concerns the application in the main proceedings of rules of Community law, not their interpretation. Like the Commission, I consider that it is not for the Court to decide the dispute in the place of the national court, and that it is for the national court, having regard to all the facts at its disposal and in particular its knowledge of the proportion of bought-in services in the package, to give judgment on the basis of the answer to the first question.

The questions referred by the Value Added Tax Tribunal

42. The Value Added Tax Tribunal assumes, as a hypothesis, that Article 26 of the Sixth Directive applies to a trader, not recognised as a travel agent or tour operator by national law, who supplies his customers in return for a package price with services which consist partly of services provided by himself and partly of services bought in from third parties. It asks the Court how to calculate the taxable margin of the services supplied, under Article 26.

43. To that end, the Value Added Tax Tribunal wishes to know the basis on which to assess the elements which make up the package price.

44. A preliminary point must be to define the scope of Article 26 in such a case, where a package covers different kinds of services, in-house and bought in from third parties.

45. Unlike the other parties which have intervened, the Swedish Government argues that the margin taxation scheme applies to all the services. In its view, selective application of Article 26 would lead to distortion of competition between travel agents who supply both bought-in and in-house services, which may be subject to different rates, and those who supply only bought-in services, which by definition are subject to the same rate of tax. General application of Article 26 to all the supplies of services would remove that distortion by making in-house services subject to the system used for bought-in services.

46. The Swedish Government's solution certainly makes it possible to avoid the complicated apportionments which are needed if two different tax systems coexist within the same contract.

47. However, it appears to me to be consistent with neither the wording nor the spirit of Article 26 of the Sixth Directive.

48. Article 26(1) states very clearly that the system it prescribes is to apply to the operations of travel agents where they 'use the supplies and services *of other taxable persons* in the provision of travel facilities'. [10]

49. The method of calculation of the taxable amount, as defined by Article 26(2), is to deduct from the total amount, exclusive of VAT, to be paid by the traveller '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'. [11]

50. The provision makes no reference to in-house services, and it is inconceivable that that omission means that because the amount of the in-house services does not appear in the amount to be deducted, it remains included in the taxable amount. The conclusion must therefore be that that category of services comes under a different tax scheme.

51. The aim pursued by the legislature, which is to adapt the applicable rules to the specific nature of the operations of travel agents, confirms that approach. The supply of in-house services takes place for the most part in the Member State in which the trader has established his business or has a fixed establishment, and that is also the place of taxation of

10 — My emphasis.
11 — My emphasis.

the bought-in services under Article 26. The place of taxation of those services is thus the same as the place of taxation of the in-house services, as in the case where a trader uses bought-in services exclusively, so that, first, the distortion of competition between traders objected to by the Swedish Government is not likely to occur particularly often and, second, the application of Article 26 to in-house services is not so advantageous, on this hypothesis, from the point of view of simplification.

52. In the present state of the law, the distortion which in my opinion is to be avoided is that which derives from the application of two different tax schemes — the method of determining the taxable amount provided for in Article 11 of the Sixth Directive and that provided for in Article 26 — to identical activities pursued in the same conditions, that is, by means of services bought in from third parties.

53. I therefore conclude that the system under Article 26 applies to those services only.

54. It follows that the taxable person must carry out two apportionments of the amount paid by his customers for the package, so as to identify the margin on the bought-in services.

55. The first apportionment establishes the common margin by deducting the expenditure incurred to produce the in-house and bought-in services.

56. The second apportionment distinguishes the margins for each category of services, in order to identify the taxable amount of the bought-in services.

57. Article 26 of the Sixth Directive defines the method of calculation of the taxable margin on the supply of services bought in from third parties. For that purpose it refers to the actual cost to the travel agent of the supplies and services provided by other taxable persons, and that amount deducted from the total amount, exclusive of VAT, to be paid by the traveller corresponds to the taxable margin.

58. However, as the provision does not envisage the case where mixed services are supplied in return for payment of a package sum, it makes no provision for isolating the margin on bought-in services from the amount of in-house services.

59. The national tribunal's questions concern the reference unit to be taken in order to evaluate the cost, deduction of which will serve to identify the margin. The tribunal

suggests two possible methods, one based on cost, the other on the value of the components of the package.

60. The former corresponds to the British TOMS scheme. It is supported by the United Kingdom and German Governments. The trader calculates the total cost he incurs in supplying mixed services in return for the package price. That cost consists of, first, what he has paid for the bought-in services and, second, the cost generated by the supply of in-house services. The common margin for both kinds of services is obtained by deducting from that total cost the amount of the package payments received.

The common margin is then divided into its two components: the margin on the bought-in services and the margin on the in-house services. To do that, the apportionment takes place on the basis of the ratio of the expenditure on the bought-in services to the cost of the in-house services.

The margin on the bought-in services comes under the Article 26 scheme, while the margin on the in-house services is taxed in accordance with the general system of the Sixth Directive.

61. The second method, supported by Mr Madgett and Mr Baldwin and by the Commission, is based on the market value of the components of the package. In other words, the expenditure incurred by the trader must, in the opinion of Mr Madgett and Mr Baldwin, be assessed in accordance with Article 11(A)(1)(a) of the Sixth Directive, which refers to the amount received as consideration for the services.

62. A final possibility, put forward by the Swedish Government, is to calculate the taxable amount, in order to ensure neutrality of taxation, by reference to the actual costs of the bought-in services and to the amount which the trader would have spent had he obtained the in-house services from third parties. The Swedish Government suggests that the wholesale price of the latter services should be used. That is to be calculated on the basis of the price charged for an identical service by a third party. Note that this method of calculation is applied in the context of taxation of the common margin on the different services.

63. The selective application of the VAT scheme for travel agents which I propose could justify assessment of the in-house services in accordance with Article 11(A)(1)(a) of the Sixth Directive, since they remain subject to the general VAT system.

64. The Court has held that the taxable amount for a supply of services consists of everything received as consideration for the service supplied, that consideration being a subjective value, since the taxable amount is the consideration actually received and not a figure estimated according to objective criteria. [12] That is an expression of the idea that it is the parties to the contract alone who decide the price which can be charged by reference to the criteria they consider appropriate. It may no doubt be supposed that, out of concern for economic efficiency, they will set prices by reference to objective factors, but the taxable amount cannot be determined on the basis of hypothetical reasonable behaviour. What must prevail is the reality of the economic operation to be taxed.

65. This approach cannot, however, simply be applied as such to the present case. The existence of a package price covering both categories of services without distinction prevents assessment of the taxable amount by reference to the consideration within the meaning of Article 11(A)(1)(a) for the in-house services supplied as part of the package. It is evidently impossible to isolate that consideration from the remainder of the package, so that the margin for the bought-in services cannot be ascertained by this method.

66. The Commission nevertheless suggests that the consideration may be assessed by reference to the market value of the components of the in-house services. It proposes that reference be made to the room price charged by the hotel where customers are not on the package, that is, when they travel independently and do not go on the excursion.

67. I consider, however, that each of the methods suggested contains an element of arbitrariness, which suggests that the criterion based on the closeness of the taxable amount to the reality of the economic operation concerned is not a criterion which will make it possible to select one method in preference to the others.

68. The method proposed by the Commission presupposes that the price of accommodation offered as an in-house service as part of the package is identical to the price of accommodation where that is offered as a single service.

69. However, a trader may have decided to offer the same service at a different rate. It is not unusual for a package to be the occasion of offering a service at a lower price in order to make the offer of mixed services more attractive. The market on which the mixed services are offered is not precisely the same as the market on which accommodation alone is offered, so that the market value of the components is not necessarily reflected in the price of the accommodation.

12 — See Case 154/80 *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraphs 10 to 13, and Case 230/87 *Naturally Yours Cosmetics* v *Commissioners of Customs and Excise* [1988] ECR 6365, paragraph 16.

70. Consequently, this method of calculation has the defect of being somewhat approximate.

71. The method suggested by the United Kingdom and German Governments appears to me to have comparable inadequacies. Although this method of calculation begins by referring to the costs of the services provided, which are actual figures, it continues with a deduction which owes nothing to the reality of the taxable transaction, in order to apportion the common margin between the margin on bought-in services and the margin on in-house services. In fact there is no reason to suppose that the respective margins on the services which make up the package are proportional to their respective shares of the costs. It is thus at least as arbitrary to make that correspondence into a rule as to say that the price of the in-house services in the package is the same as the price charged for them outside the package.

72. The Swedish Government's method requires the use as comparators of averages based on like services supplied by other traders. The wish to refer to a representative figure by means of such an assessment is legitimate. However, the figure arrived at is largely fictitious, since it has no direct relation to the service which is to be taxed. Moreover, there is a risk of imprecision, as the reference average may be disputed and thus become the subject of arguments among experts.

73. Choosing a method on the sole ground that it faithfully reflects the actual structure of the package must therefore be abandoned.

74. Consequently, I propose that the Court should adopt — however imperfect it may be — the method suggested by Mr Madgett and Mr Baldwin and the Commission, which minimises the practical difficulties of implementation while not encountering any major problem from the point of view of lawfulness.

75. A first stage is to deduct from the package price paid by the consumer the price paid for the bought-in services. These two elements are beyond dispute, since they are matters of fact. This stage is also consistent with Article 26.

76. Deduction of the market value of the in-house services has the advantage of simplicity but does not, as I have stated, reflect precisely the structure of the prices of those services within the package. Whereas with the cost-based method of calculation the taxable margin must be identified on the basis of the common margin, here there is no need to distinguish the different elements of the value of

the services. [13] The margin and the cost together constitute the reference value of the in-house services, which need only be deducted from the package price to obtain the value of the bought-in services. Deduction, as described above, of the price paid for the latter services then produces the taxable margin, which is thus obtained without it being necessary to deconstruct the value of the in-house services.

77. Moreover, the cost-based method requires a complicated reconstruction of the various elements of the cost price, which cannot be done without apportioning overheads between the in-house services, deduction of which from the package price gives the common margin which will be used to calculate the taxable amount, and the in-house services outside the package.

78. Having recourse to market value also avoids uncertainties to do with the nature of the costs which must be deducted. The third sentence of Article 26(2) of the Sixth Directive provides for the deduction of the actual costs to the travel agent of the bought-in services where those transactions are for the direct benefit of the traveller. It follows that overheads, which do not satisfy that condition but are nevertheless used for the whole of the trader's activity, form part of the taxable margin for the bought-in services but are excluded from the margin for the in-house services. Calculation of the costs would require those overheads to be apportioned between those two categories of services. But the market values of the in-house services already include them and they do not have to be isolated in calculating the margin for the bought-in services.

79. Finally, the German Government criticises this method of assessment as not being based on the same reference units, since there are deducted from the package price a cost, namely that of the bought-in services which are of direct benefit to the traveller, and a value, namely that of the in-house services.

80. That point should not, in my opinion, distort the assessment of the taxable amount, as the package itself constitutes a value which is made up of various costs and margins. Since the object of the method chosen is to identify the taxable margin in respect of the bought-in services, it is possible to deduct from the package price the market value of the in-house services, which includes the cost and margin for those services.

81. For the above reasons, I consequently conclude that the margin should be assessed on the basis of the market value of the in-house services.

13 — As with the cost-based method, the Swedish Government's method requires identification of the proportion of the value of the in-house services which constitutes the margin for those services, so as to reconstruct the common margin, which in the Government's opinion must be taxed as a whole.

Conclusion

82. In the light of the above considerations, I propose the following answer to the questions referred by the High Court of Justice, Queen's Bench Division:

1. Article 26 of the 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 terms 'travel agent' and 'tour operator' apply to a trader who, although not recognised as a travel agent or tour operator by his national law, habitually arranges travel or tours, dealing with the traveller in his own name and making use of services supplied directly to the traveller by third parties.

Where the services which the traveller receives are supplied partly by other taxable persons and partly by the trader himself, the trader may not be regarded as a 'travel agent' or 'tour operator' within the meaning of Article 26 if the services supplied directly by third parties are ancillary in relation to the other services.

2. It is for the national court to decide the main proceedings on the basis of the answer to Question 1.

83. I propose the following answer to the questions referred by the Value Added Tax Tribunal:

Where a trader who comes under the provisions of Article 26 of the Sixth Directive 77/388 carries out, in return for payment of a package price, operations which consist of services supplied partly by himself and partly by other taxable persons, the VAT scheme provided for in Article 26 may be applied only to the latter, in so far as they are of direct benefit to the traveller.

The margin which constitutes the taxable amount within the meaning of Article 26(2) of the Sixth Directive is to be obtained by apportioning the package price, exclusive of tax, between the in-house services and the services bought in from other taxable persons on the basis of the market value of the in-house services.