JUDGMENT OF THE COURT (Fifth Chamber)
22 October 1998 *

In Joined Cases C-308/96 and C-94/97,

REFERENCES to the Court under Article 177 of the EC Treaty by the High Court of Justice of England and Wales, Queen's Bench Division, and the VAT and Duties Tribunal, London, for preliminary rulings in the proceedings pending before them between

Commissioners of Customs and Excise

and

T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel (Case C-308/96),

and between

T. P. Madgett and R. M. Baldwin, trading as The Howden Court Hotel,

and

* Language of the case: English.

Commissioners of Customs and Excise (Case C-94/97),

on the interpretation of 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 (OJ 1977 L 145, p. 1),

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann (Rapporteur), L. Sevón and M. Wathelet, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Madgett and Mr Baldwin (Cases C-308/96 and C-94/97), by Jeremy Woolf, Barrister, instructed by Rice-Jones & Smiths, Solicitors,

— the United Kingdom Government (Case C-308/96), by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Stephen Richards and Hugh Davies, Barristers,

— the United Kingdom Government (Case C-94/97), by Lindsey Nicoll, Nicholas Paines QC and Hugh Davies,

— the German Government (Case C-308/96), by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the German Government (Case C-94/97), by Ernst Röder and Claus-Dieter Quassowski, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent,

— the Greek Government (Case C-308/96), by Fokion Georgakopoulos, Deputy Legal Adviser in the State Legal Service, and Anna Rokofyllou, Adviser to the Deputy Minister for Foreign Affairs, acting as Agents,

— the Swedish Government (Cases C-308/96 and C-94/97), by Erik Brattgård, Departementsråd in the Foreign Trade Division of the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities (Case C-308/96), by Nicholas Khan and Enrico Traversa, of its Legal Service, acting as Agents,

— the Commission of the European Communities (Case C-94/97), by Richard Lyal, of its Legal Service, acting as Agent, and Enrico Traversa,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Madgett and Mr Baldwin, represented by Jeremy Woolf and Peter Burton, Solicitor; the United Kingdom Government, represented by Dawn Cooper, of the Treasury Solicitor's Department, acting as Agent,

and Nicholas Paines and Stephen Richards; the German Government, represented by Ernst Röder; the Greek Government, represented by Fokion Georgakopoulos and Anna Rokofyllou; and the Commission, represented by Nicholas Khan and Richard Lyal, at the hearing on 5 February 1998,

after hearing the Opinion of the Advocate General at the sitting on 30 April 1998,

gives the following

Judgment

1 By order of 16 November 1995, received at the Court on 23 September 1996, the High Court of Justice of England and Wales, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of 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 (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 By order of 26 February 1997, received at the Court on 3 March 1997, the VAT and Duties Tribunal, London, referred for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of the same provision of the Sixth Directive.

3 Those questions were raised in proceedings in which Mr Madgett and Mr Baldwin are in disagreement with the Commissioners of Customs and Excise as to whether the special scheme under Article 26 of the Sixth Directive applies to them by reason of the fact that they offer travel packages to their customers in the context of their hotel business.

4 Under Article 11A(1)(a) of the Sixth Directive, the taxable amount, in respect of most supplies of services, consists of '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 ...'.

5 Article 26 of the Sixth Directive, which introduces an exception to the general rules on the taxable amount with respect to certain operations of travel agents and tour operators, states:

'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 11A(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.'

6 Article 26 of the Sixth Directive was transposed in United Kingdom law by section 37A of the Value Added Tax Act 1983 and the Value Added Tax (Tour Operators) Order 1987. A detailed explanation of the provisions of the United Kingdom legislation is given in Leaflet 709/5/88 of the Commissioners of Customs and Excise, entitled 'Tour Operator's Margin Scheme' (hereinafter 'TOMS'). That scheme requires the total amount received by the travel agent or tour operator to be apportioned between services bought in from third parties and in-house services, by reference to the actual cost of each component.

7 Mr Madgett and Mr Baldwin run the Howden Court Hotel in Torquay, Devon, England. 90% of the hotel's customers, most of whom come from the north of England, buy a 'package', that is to say that they 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 during their stay at the hotel. Mr Madgett and Mr Baldwin obtain the transport services from third parties. The other customers make their own travel arrangements to and from the hotel. They do not have the sightseeing excursion and pay a different price.

8 Mr Madgett and Mr Baldwin consider that Article 26 of the Sixth Directive does not apply to them, on the ground that they are hoteliers, not tour operators. They also state that, using the general rules of the Sixth Directive for determining the taxable amount, the quarterly VAT returns involved Mr Madgett in only half a day's work, whereas TOMS calculations, by requiring a series of sub-apportionment exercises, would involve substantial additional work.

9 The Commissioners of Customs and Excise take the view, however, that TOMS applies also to hoteliers who offer their customers travel packages containing both components which the operator provides himself ('in-house services') and components which he buys in from third parties; in the notices of assessment for the period from 1 May 1988 to 31 January 1993, they therefore considered that Mr Madgett and Mr Baldwin should be taxed under that scheme.

10 In those circumstances, Mr Madgett and Mr Baldwin appealed to the VAT and Duties Tribunal, which held that Article 26 of the Sixth Directive did not apply to them. The Commissioners of Customs and Excise appealed against that decision to the High Court of Justice, which stayed proceedings and referred the following two questions to the Court for a preliminary ruling (Case C-308/96):

'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)?'

11 In the proceedings before the High Court of Justice, Mr Madgett and Mr Baldwin raised the further argument that the method of apportionment prescribed by TOMS was contrary to the Sixth Directive. Since that point was not the subject of the appeal before the High Court, the proceedings before the VAT and Duties Tribunal were reopened.

12 In the latter proceedings, Mr Madgett and Mr Baldwin submitted that the provision requiring the price paid by the traveller to be apportioned between the components of the package bought in from third parties and the components provided as in-house services on the basis of the actual costs is neither rational nor logical. The Commissioners of Customs and Excise contended that in providing that the tour operator's margin is to be calculated on the basis of the actual cost for both bought-in supplies and in-house supplies, TOMS is consistent with the provisions of Article 26 of the Sixth Directive.

13 In those circumstances, the VAT and Duties Tribunal stayed the proceedings and referred the following two questions to the Court for a preliminary ruling (Case C-94/97):

'If it is determined in Case C-308/96 that the provisions of Article 26 of the Sixth Directive 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 under Article 26(2) to be calculated?

2. 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?'

14 By order of the President of the Court of 11 December 1997, the two cases were joined for the purposes of the oral procedure and the judgment.

The questions referred by the High Court of Justice

15 By its questions, which should be examined together, the High Court essentially asks whether Article 26 of the Sixth Directive applies to a hotelier who, in return for a package price, offers his guests, in addition to accommodation, return transport between distant pick-up points and the hotel and an excursion by coach during their stay at the hotel, those transport services being bought in from third parties.

16 Mr Madgett and Mr Baldwin submit that for a trader to be subject to the special scheme under Article 26 of the Sixth Directive, he must be either a 'travel agent' or a 'tour operator'. Those expressions refer to taxable persons whose activity consists in organising, for the benefit of travellers, the supply of accommodation or transport or other travel services, using the supplies of other persons which are acquired for the direct benefit of travellers. Those expressions do not refer to taxable persons who, as an ancillary part of another activity, buy travel services for the direct benefit of travellers. They consider that their business is concentrated essentially on the service offered to hotel guests and that the transport is provided only for their convenience, to encourage them to stay in the hotel. The transport should therefore be regarded as purely ancillary to their activity as hoteliers.

17 The United Kingdom, German, Greek and Swedish Governments and the Commission submit that the criterion for determining whether a taxable person's transactions are subject to Article 26 of the Sixth Directive is whether the supplies of services in question are of the kind referred to in that provision, even if the taxable person is not a travel agent or tour operator in the ordinary meaning of those terms. In those circumstances, the transactions effected by Mr Madgett and Mr Baldwin fall within the scope of Article 26 of the Sixth Directive, since they provide services in their own name, offering their customers a single package which includes travel

and accommodation, and using for that purpose a coach service provided by a third party under a transaction which is for the direct benefit of travellers.

18 It must be borne in mind at the outset that the services provided by travel agents and tour operators most frequently consist of multiple services, in particular transport and accommodation, supplied 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 (see Case C-163/91 *Van Ginkel* v *Inspecteur der Omzetbelasting te Utrecht* [1992] ECR I-5723, paragraphs 13 to 15).

19 Although the principal reason for the special margin scheme under Article 26 of the Sixth Directive is the existence of problems in connection with travel services which include elements in more than one Member State, the wording of that provision is such that it applies also to supplies of services within a single Member State.

20 Furthermore, the underlying reasons for the special scheme for travel agents and tour operators are equally valid where the trader is not a travel agent or tour operator within the normal meaning of those terms, but effects identical transactions in the context of another activity, such as that of hotelier.

21 To interpret Article 26 of the Sixth Directive as applying solely to traders who are travel agents or tour operators within the normal meaning of those terms would

mean that identical services would come under different provisions depending on the formal classification of the trader.

22 Finally, as the Advocate General observes in point 32 of his Opinion, to make application of the special scheme under Article 26 of the Sixth Directive depend on a prior classification of a trader would prejudice the aim of that provision, create distortion of competition between traders and jeopardise the uniform application of the Sixth Directive.

23 It must therefore be held that the scheme under Article 26 of the Sixth Directive applies to traders who organise travel or tour packages in their own name and entrust other taxable persons with the supply of the services generally associated with that kind of activity, even if they are not, formally speaking, travel agents or tour operators.

24 However, as the Advocate General notes in point 36 of his Opinion, traders such as hoteliers who provide services habitually associated with travel frequently make use of services bought in from third parties which take up a small proportion of the package price compared to the accommodation and are among the tasks traditionally entrusted to such traders. Those bought-in services do not therefore constitute for customers an aim in itself, but a means of better enjoying the principal service supplied by the trader.

25 In such circumstances the services bought in from third parties remain purely ancillary in relation to the in-house services, and the trader should not be taxed under Article 26 of the Sixth Directive.

26 Where, however, a hotelier habitually offers his customers, in addition to accommodation, services which go beyond the tasks traditionally entrusted to hoteliers, and which cannot be carried out without a substantial effect on the package price charged, such as travel to the hotel from distant pick-up points, such services are not to be equated with purely ancillary services.

27 In view of the foregoing, the answer to the questions referred by the High Court of Justice must be that Article 26 of the Sixth Directive applies to a hotelier who, in return for a package price, habitually offers his customers, in addition to accommodation, return transport between certain distant pick-up points and the hotel and a coach excursion during their stay, those transport services being bought in from third parties.

The questions referred by the VAT and Duties Tribunal

28 By its questions, which should be examined together, the VAT and Duties Tribunal essentially asks how to calculate the taxable margin within the meaning of Article 26 of the Sixth Directive where a trader who is subject to that provision effects, in return for a package price, transactions consisting partly of in-house services and partly of bought-in services.

29 In order to answer that question, it must first be determined whether, where packages are made up of mixed services, Article 26 applies only to the services bought in from third parties, or to all the services. Thereafter, the method of calculating the part of the package relating to in-house services will be examined.

30 With respect to the first part of the question, Mr Madgett and Mr Baldwin, the United Kingdom and German Governments and the Commission submit that the special scheme under Article 26 of the Sixth Directive applies only to services bought in from third parties.

31 The Swedish Government, however, considers that Article 26 should also be applied to in-house services.

32 Here, it must first be borne in mind that under Article 26(1) of the Sixth Directive the scheme applies to the operations of travel agents where the supplies and services of other taxable persons are used in the provision of travel facilities, and that under Article 26(2) the taxable amount is the difference between the total amount to be paid by the traveller, excluding VAT, and the actual cost to the travel agent of the supplies and services provided by other taxable persons.

33 Next, it is to be noted that Article 26 of the Sixth Directive makes no reference to in-house services, and that the essential aim of that provision is to avoid the difficulties to which traders would be exposed by application of the general principles of the Sixth Directive concerning transactions involving the supply of services bought in from third parties.

34 Finally, it should be recalled that the scheme under Article 26 constitutes an exception to the normal rules of the Sixth Directive and must be applied only to the extent necessary to achieve its objective.

35 The special scheme under Article 26 of the Sixth Directive must therefore be held to apply only to the services bought in from third parties.

36 With respect to the second part of the question, Mr Madgett and Mr Baldwin and the Commission submit that the price of the in-house services should be calculated on the basis of market value, in accordance with the normal principles for determining the taxable amount laid down in Article 11 of the Sixth Directive. In the present case the market value of the accommodation is the room price charged by the hotel to customers not making use of the package.

37 The German Government, however, submits that the apportionment between that part of the travel which falls within the special scheme under Article 26 and that part to which Article 26 does not apply should in principle reflect the ratio of the actual costs of the services bought in from third parties to the costs incurred for the in-house services. The part of the travel price relating to in-house services may, however, be determined in another way in some cases, if that leads to an appropriate result.

38 The United Kingdom Government explains that under TOMS, which it considers to be compatible with Article 26 of the Sixth Directive, the trader must calculate the total cost to him of providing packages, that cost being made up of, on the one hand, the sums he pays for the services bought in from third parties and, on the other, the cost to him of providing the in-house services. The total cost is subtracted from the total amount received, to produce the total margin. That margin is then divided into the margin on the bought-in services and the margin on the in-house services, in the proportion of the expenditure relating to the bought-in services to

the cost of the in-house services. To ensure uniform application of the tax, the same rules should apply regardless of the proportion of in-house and bought-in services in the package. Since Article 26 prescribes a system of taxing the bought-in element by reference to the margin, that is to say to the difference between actual cost and income, there is no reason to depart from that principle with respect to the in-house services.

39 It should be recalled that Article 26 of the Sixth Directive, because it does not contemplate the provision of packages comprising both bought-in and in-house services, does not define any criteria by which the margin on bought-in services may be identified in distinction to the margin on in-house services.

40 In this connection, it should be noted that Article 11A(1)(a) of the Sixth Directive states that the taxable amount for VAT consists, in respect of most services, of everything which constitutes the consideration for the service. It has consistently been held that the consideration must be interpreted as what is actually received, not as a value estimated according to objective criteria (see Case 230/87 *Naturally Yours Cosmetics* v *Commissioners of Customs and Excise* [1988] ECR 6365, paragraph 16).

41 As the Advocate General observes in point 65 of his Opinion, it follows from the existence of a package price covering both services bought in from third parties — and so covered by Article 26 — and in-house services — not covered by that provision — that the consideration within the meaning of Article 11A(1)(a) of the Sixth Directive cannot be used as the taxable amount for the in-house services which are provided as part of the package.

42 It is therefore necessary to determine the unit of reference to be used as an alternative to the consideration in order to identify the part of the package which relates

to the in-house services. There are two possible methods, one based on actual costs as under TOMS, the other based on market value.

43 In this context, it should be observed, first, as the Advocate General notes in point 71 of his Opinion, that the actual cost method used by the United Kingdom Government could be problematical, as there is no reason to suppose that the margins on the different services which make up the package are proportional to the respective costs of those services.

44 Second, use of the criterion of market value — in the present case the room and half-board prices charged by the hotel where customers do not make use of the package — may also be to some extent arbitrary if the price of the accommodation offered as an in-house service as part of the package is taken as being the same as the price for accommodation offered as a single service.

45 The actual cost method in relation to the in-house services requires a series of complex sub-apportionment exercises and thus also means substantial additional work for the trader. By contrast, use of the market value of the in-house services, as the Advocate General observes in point 76 of his Opinion, has the advantage of simplicity, since there is no need to distinguish the various elements of the value of the in-house services.

46 In those circumstances — bearing in mind that it is common ground in the present case that calculation of the VAT on the margin for the bought-in services by using one alternative or the other in principle gives the same figure for VAT — a trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package.

47 In the light of the foregoing, the answer to the questions referred by the VAT and Duties Tribunal must be that, on a proper construction of Article 26 of the Sixth Directive, where a trader subject to that article effects, in return for a package price, transactions consisting of services supplied partly by himself and partly by other taxable persons, the VAT scheme under that article applies solely to the services supplied by third parties. A trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package.

Costs

48 The costs incurred by the United Kingdom, German, Greek and Swedish 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 national proceedings, the decision on costs is a matter for the court or tribunal before which those proceedings have been brought.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division, and by the VAT and Duties Tribunal, London, by orders of 16 November 1995 and 26 February 1997, hereby rules:

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 applies to a hotelier who, in return for a package price, habitually offers his customers, in addition to accommodation, return transport between certain distant pick-up points and the hotel and a coach excursion during their stay, those transport services being bought in from third parties.

2) On a proper construction of Article 26 of the Sixth Directive 77/388, where a trader subject to that article effects, in return for a package price, transactions consisting of services supplied partly by himself and partly by other taxable persons, the VAT scheme under that article applies solely to the services supplied by third parties. A trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package.

Puissochet Moitinho de Almeida Gulmann

Sevón Wathelet

Delivered in open court in Luxembourg on 22 October 1998.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber