JUDGMENT OF THE COURT (First Chamber)

9 December 2010 *

In Case C-31/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 10 December 2009, received at the Court on 20 January 2010, in the proceedings

Minerva Kulturreisen GmbH

v

Finanzamt Freital,

* Language of the case: German.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet (Rapporteur), M. Ilešič, E. Levits and M. Safjan, Judges,

Advocate General: P. Mengozzi,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Minerva Kulturreisen GmbH, by P. Fröhler, A. Kellner and B. Juschten,

— the Finanzamt Freital, by V. Rummer,

— the German Government, by J. Möller and C. Blaschke, acting as Agents,

— the Greek Government, by K. Georgiadis, C. Poulakos and M. Tassopoulou, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes, acting as Agent,

— the European Commission, by D. Triantafyllou, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 26 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, 'the Sixth Directive').

2 The reference has been made in proceedings between Minerva Kulturreisen GmbH ('Minerva') and the Finanzamt Freital ('the Finanzamt'), concerning the application of the special scheme for travel agents provided for in Article 26 of the Sixth Directive to the sale by a travel agent of opera tickets in isolation, without the provision of additional services.

Legal context

Community legislation

3 Under paragraphs 1 and 2 of Article 26 of the Sixth Directive, entitled 'Special scheme for travel agents', which is applicable *ratione temporis* to the dispute in the main proceedings:

'1. Member States shall apply value added tax ["VAT"] 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 [VAT], 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.'

National legislation

4 Paragraph 25 of the German Law of 1993 on turnover tax (Umsatzsteuergesetz 1993, BGBl. 1993 I, p. 565, 'the UStG') provides:

'(1) The following provisions shall apply to travel services provided by an undertaking that are not provided for the purposes of the customer's business, where the undertaking deals with customers in its own name and makes use of travel-related inputs. The service provided by the undertaking is deemed to fall within the category of "other services". … Travel-related inputs are supplies and other services provided by third parties which are for the direct benefit of the traveller.

(2) …

(3) The taxable value of other services shall be the difference between the amount paid by the customer for the service and the amount paid by the undertaking for travel-related inputs. [VAT] shall not be included in the basis of assessment. …

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

5 Minerva is a travel agent. Amongst other activities in the period 1993 to 1998, it purchased tickets for the Saxon State Opera in Dresden (Semperoper) and sold them in its own name and on its own account to final customers and travel agents, either in conjunction with other services which it provided — namely services such as accommodation, city tours, shuttle services or catering services — or without them.

6 Minerva considered that the proceeds from the isolated sale of such tickets for performances were also subject to taxation of margins as provided for in Paragraph 25 of the UStG. However, when Minvera was taxed on that activity, that tax scheme was not applied to it.

7 The Finanzamt rejected the complaint filed by Minerva against the notices of assessment to tax dated 28 September 2000 for the years 1993 to 1997 and the notice of assessment to tax of 27 March 2001 for the year 1998 on the ground that, by merely purchasing and selling tickets for performances, Minerva is not performing a service 'in respect of a journey' and that, consequently, its activities cannot be distinguished from those of commercial ticket sellers.

8 By judgment of 11 February 2008, the Sächsisches Finanzgericht (Finance Court, Saxony) espoused the position of the Finanzamt and accordingly dismissed Minerva's action contesting the Finanzamt's decision rejecting its complaint.

9 Minerva appealed on a point of law ('Revision') against that judgment to the referring court. The only point outstanding before that court is whether the sale of tickets to final customers without the provision of additional services is subject to taxation of the applicant's margin under Paragraph 25 of the UStG.

10 In support of its appeal, Minerva submits that the sale by a travel agent of tickets for events should be treated as a 'travel service' for the purposes of Paragraph 25 of the UStG because, according to Minerva, the sale of those tickets amounts to a service forming part of its portfolio of different travel options and travel services.

11 Having regard to the judgment in Case C-163/91 *Van Ginkel* [1992] ECR I-5723, the referring court asks whether a travel agent which acted in its own name can be subject to taxation on margins within the meaning of Article 26 of the Sixth Directive in respect of proceeds made on the sale of tickets for performances, or whether, in order to be treated under that tax scheme, it is necessary for the individual service to comprise one of the core services provided by the traders to which that provision applies.

12 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the "special scheme for travel agents" provided for in Article 26 of [the Sixth Directive] apply also to the sale by a travel agent of opera tickets in isolation, without the provision of additional services?'

Consideration of the question referred

13 By its question, the referring court asks whether any service provided by a travel agent falls under the special scheme provided for in Article 26 of the Sixth Directive, or whether a service provided by a travel agent falls under that scheme only if it involves a travel service.

14 First, Article 26(1) of the Sixth Directive states that the special scheme provided for under that provision applies to travel agents and tour operators where they deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities.

15 Consequently, the wording of that provision makes clear that in order for a travel agent's service to come under the special scheme defined therein, it must relate to a journey.

16 Secondly, it should be borne in mind that 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 and that, 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 (Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraphs 5 and 34, and Case C-149/01 *First Choice Holidays* [2003] ECR I-6289, paragraphs 21 and 22).

17 Thirdly, the objective of the special scheme under 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 (*Madgett and Baldwin*, paragraph 18, and *First Choice Holidays*, paragraph 23).

18 In that regard, it is clear from the case-law that that activity is characterised by the fact that, in most cases, the services provided by such undertakings consist of multiple services, in particular transport and accommodation, supplied partly outside and partly inside 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 (see *Madgett and Baldwin*, paragraph 18, and *First Choice Holidays*, paragraph 24).

19 It should also be noted that, contrary to the Greek Government's assertions, it cannot be inferred from *Van Ginkel* that any individual service provided by a travel agent or tour operator falls under the special scheme provided for in Article 26 of the Sixth Directive.

20 In paragraph 23 of *Van Ginkel*, the Court held that the exclusion from the scope of Article 26 of the Sixth Directive of services provided by a travel agent on the ground that they cover only the accommodation and not the transport of the traveller would lead to a complicated tax system in which the VAT rules applicable would depend upon the constituent elements of the services offered to each traveller and that such a tax system would fail to comply with the aims of the directive.

21 It is apparent from that judgment that the Court did not hold that any service whatsoever provided by a travel agent which is unrelated to a journey falls under the special scheme provided for in Article 26 of the Sixth Directive, but that the provision by a travel agent of accommodation comes within the scope of that provision, even if that service covers accommodation only and not transport.

22 It also follows from paragraph 24 of *Van Ginkel* that where a service is not coupled with travel services, in particular transport and accommodation, it does not come within the scope of Article 26 of the Sixth Directive.

23 It follows from the foregoing considerations that the sale by a travel agent of opera tickets in isolation, without the provision of a travel service, does not come under the special scheme provided for in Article 26 of the Sixth Directive.

24 It should also be observed that the application of that special scheme to an activity such as that at issue in the main proceedings, where the travel agent merely sells tickets for performances without the provision of a travel service, would distort competition, in view of the fact that a given activity would be taxed differently according to whether or not the trader selling those tickets is a travel agent.

25 The answer to the question referred is therefore that Article 26 of the Sixth Directive is to be interpreted as not applying to the sale by a travel agent of opera tickets in isolation, without the provision of a travel service.

Costs

26 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 26 of Sixth Council Directive 77/338/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, is to be interpreted as not applying to the sale by a travel agent of opera tickets in isolation, without the provision of a travel service.

[Signatures]