OPINION OF ADVOCATE GENERAL GULMANN
delivered on 1 October 1992 *

Mr President,
Members of the Court,

1. The Gerechtshof te Amsterdam has thought it necessary, in a case pending before it, to obtain a decision on whether a given taxable activity is covered by Article 26 of the Council's Sixth Directive on VAT, [1] which lays down a special system for travel agents. [2] In that connexion it has referred two questions to the Court for a preliminary ruling.

2. The background to the case is a dispute between the Netherlands tax authorities and a Netherlands tour operator (hereinafter 'Van Ginkel'). The dispute relates to that part of Van Ginkel's operations which consists in arranging so-called 'motoring holidays'. For such holidays the traveller himself arranges for transport to the holiday destination, where Van Ginkel makes holiday accommodation available. The dispute concerns only the case in which the holiday accommodation is owned by a third party and is situated in the Netherlands. The traveller 'purchases' the service, that is, a short-term stay in the holiday accommodation, direct from Van Ginkel or through another travel agent. Van Ginkel pays the owner of the house and charges in that connexion a commission of 20% of the rent. Van Ginkel paid VAT on the amount of the commission under the impression that the commission was the correct taxable amount. The tax authority demanded a supplementary payment because, in its view, the taxable amount was the full letting price.

3. The special system for travel agents applies, in accordance with Article 26 of the directive, when certain conditions are met and involves on a number of points exceptions to the general rules of the directive on the calculation and levying of the VAT.

According to Article 26(1), the Member States are to apply the special system to transactions effected by travel agents and tour operators — hereinafter referred to for the sake of convenience, simply as 'travel agents'. Article 26 applies only 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'.

* Original language: Dutch.

1 — Directive 77/388/EEC of 17 May 1977 on the harmonization 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 — On 15 September 1992 I delivered an Opinion in Case C-74/91 *Commission* v *Germany*, the subject of which was Article 26(3) of the Sixth Directive on VAT. This case relates particularly to the provisions of Article 26(1) and (2).

Article 26(2) provides that:

— transactions peformed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller;

— that service shall be taxable in the Member State in which the travel agent has established his business; and

— the taxable amount shall be the travel agent's *margin of profit*, that is, the difference between the amount to be paid by the traveller and the cost to the travel agent of services provided by other taxable persons for the direct benefit of the traveller.

Article 26(3), which is not directly relevant in this case, provides that the taxable amount, that is, the margin of profit, is reduced if the services to the traveller are performed outside the Community.

Article 26(4) provides that travel agents cannot deduct VAT paid by the taxable persons from whom the agent has purchased the services provided.

Article 26 thus contains, for the travel agents concerned, a practical system for the calculation of VAT having its background partly in the problems arising from these undertakings' special position as providers of typically complex services and partly, and in particular, from the fact that it frequently involves services performed in countries other than the one in which the travel agents are established. An essential aim of the system is to avoid the problems which travel agents would have with the tax authorities in other Member States if the general rules with regard to the calculation, payment and allowance for deduction of VAT were applied. The services included in the travel agent's sale of a journey to a customer, consisting for example in accommodation, board and transport in other Member States are dealt with for tax purposes according to those countries' rules, whereas, for the travel agent's 'independent service' tax is paid on the agent's margin of profit in the agent's own Member State. Even though the typically cross-frontier features of a travel agent's operations therefore constitute an essential part of the reason for Article 26, that article nevertheless undoubtedly applies also to the operations of a travel agent performed exclusively in one and the same Member State.

It should also be stressed — as is done particularly by the Commission — that the application of Article 26 pre-supposes *that* in providing travel facilities the travel agent uses services performed by other *taxable persons* and *that* the travel agent's margin of profit represents the difference between the price the traveller is to pay the travel agent and the agent's costs in purchasing from *other taxable persons* services for the direct

benefit of the traveller. That has two consequences. The first is that Article 26 does not apply if the travel agent uses exclusively his own services or services provided by non-taxable persons, and secondly that the margin of profit on which the agent is to pay VAT under paragraph (2) includes both his own services and services performed by non-taxable persons. Those conditions mean also that in any event it is irrelevant in a case such as this, as regards the amount of the VAT the traveller has to pay, whether or not the so-called 'motoring holidays' are covered by Article 26.

4. The Gerechtshof te Amsterdam, in its judgment referring the questions to the Court, took as its basis the fact that Van Ginkel trades as a tour operators and operates travel agencies and that the company therefore meets that condition for the application of Article 26(1). The Gerechtshof also accepted that Van Ginkel deals with customers in its own name within the meaning of Article 26 and that the company did not act as an intermediary. However, the Gerechtshof is in doubt on a single point as to whether the conditions for the application of Article 26 are met in this specific case. On that point it states:

'It is unclear whether a case in which a tour operator ... arranges an agreement under which a holiday dwelling is made available for a short stay but does not arrange transport for the traveller to and from the holiday dwelling may be regarded as *the provision of travel facilities* for these purposes, or may only be regarded as the *letting of the dwelling*.'

In order to dispel that doubt the Gerechtshof has referred the following question to the Court for a preliminary ruling:

'Where a taxable person lets holiday dwellings to customers who arrange their own transport to and from the dwellings and for that purpose enters into agreements with third parties under which the dwellings are made available to him, can such acts be regarded as the provision of travel facilities for the purposes of Article 26(1) of the Sixth Directive or as transactions performed in respect of a journey for the purposes of Article 26(2)?'

5. The Netherlands Government claims that there are reasonable grounds for a negative answer to that question. It observes *inter alia* that transport represents a characteristic feature of a journey. It refers also to the fact that Article 26 must pre-suppose that the service sold to the traveller consists of a group of services. In that connexion the government refers to the fact that Article 26 speaks logically of the provision of services and must therefore pre-suppose that the travel agent supplies more than one service. The government refers also to paragraph (2), according to which 'transactions' performed by the travel agent are to be treated as 'a single service'.

6. Van Ginkel, the German and United Kingdom Governments and the Commission

all agree that Article 26 does not pre-suppose that the services sold by the travel agent include transport. They also state that Article 26 does not involve a supposition that the service sold covers a group of services.

7. In my view there can be no doubt that the answer to the question raised must be that the letting by travel agents of holiday accommodation owned by third parties to travellers providing their own transport to and from the destination are also covered by Article 26.

There is nothing in the wording of the provision to contradict that result. When the position in paragraphs (1) and (2) of the concepts 'in the provision of travel facilities' and 'in respect of a journey' are considered, it cannot be assumed that the use of the concept is intended to restrict the sphere of application of the provision. The use of the concept is probably meant simply to emphasize that the service provided must be a feature of a journey, but not that the journey, that is, the transport, is necessarily to form part of the service provided.

The aims of the provision militate against a restrictive interpretation. The aims do not suggest that special importance is given to the inclusion of travel in the service provided or that there must necessarily be more than one service. The practical problems arising for travel agents with regard to the provision of services in other Member States and which the provision aims to solve exist also with regard to the provision of one or more services not including transport. In this connexion it is clear that the provision is to be interpreted in the same way whether the provision of the service or services in a specific case is effected in other States or in the travel agent's own country.

It is probably also correct, as Van Ginkel and the United Kingdom Government mention, that a restrictive interpretation of Article 26 would raise practical difficulties in a number of cases, including a case in which the travel agent 'purchases' a number of nights' accommodation in other Member States without knowing whether the service subsequently to be performed for the traveller will include transport.

The fact that the Advisory Committee for Value Added Tax, [3] at a meeting in April 1984 expressed the view that Article 26 applies where the travel agent uses at least one service performed by another taxable person in the provision of travel facilities militates in favour of the abovementioned solution.

8. These reasons are in my view sufficient to establish that the answer to the question referred to the Court must be that Article 26 must also apply even where the customer himself provides transport to the holiday accommodation and I do not therefore think it necessary to go into the other arguments

3 — That committee was set up in pursuance of Article 29 of the directive. It consists of representatives of the Member States and the Commission. Its opinions are not binding.

put forward in favour of that interpretation and set out in the report for the hearing.

9. The Gerechtshof has raised a further question worded as follows:

'Does the answer to the question differ if the taxable person is a tour operator and, in addition to performing the acts described in Question 1, also provides travel facilities which include transport to and from the accommodation?'

With regard to this question it may be briefly stated, first, that the answer to the first question is based on the supposition that the taxable undertaking is a travel agent or a tour organizer, and secondly that it follows from the answer to the first question that for the application of Article 26 it is of no importance whether the relevant service for the customer also includes transport to and from the holiday accommodation.

The answer to the first question therefore makes it unnecessary to answer the second question.

Conclusion

10. I therefore propose that the Court of Justice reply as follows to the questions referred to it by the Gerechtshof te Amsterdam:

Article 26 must be interpreted as including transactions performed by a travel agent or a tour operator and consisting in letting to the traveller holiday accommodation belonging to a taxable third party even if the traveller provides his own transport to and from the holiday accommodation.