JUDGMENT OF THE COURT (Third Chamber)

6 October 2005 *

In Case C-291/03,

REFERENCE for a preliminary ruling under Article 234 EC from the VAT and Duties Tribunal, Manchester (United Kingdom), made by direction of 30 June 2003, received at the Court on 4 July 2003, in the proceedings

MyTravel plc

v

Commissioners of Customs & Excise,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet (Rapporteur), J.-P. Puissochet, S. von Bahr and U. Lõhmus, Judges,

* Language of the case: English.

Advocate General: P. Léger,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 November 2004,

after considering the observations submitted on behalf of:

— MyTravel plc, by N. Gibbon, Solicitor, and J. Woolf, Barrister,

— the United Kingdom Government, by K. Manji, acting as Agent, and N. Paines QC,

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

after hearing the Opinion of the Advocate General at the sitting on 12 May 2005,

gives the following

Judgment

1 This reference for a preliminary ruling relates to 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 was made in proceedings between MyTravel plc ('MyTravel') and the Commissioners of Customs & Excise concerning the applicability to MyTravel, following the judgment in Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, of the scheme laid down in Article 26 of the Sixth Directive.

Legal context

3 Article 11A(1)(a) of the Sixth Directive provides that the taxable amount for the purposes of value added tax ('VAT') is, in respect of most supplies of services, '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 ...'.

4 Article 26 of the Sixth Directive, which establishes a special scheme for operations of travel agents and tour operators, provides:

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.'

5 Article 26 of the Sixth Directive is implemented in domestic law by section 53 of the Value Added Tax Act 1994 and the Value Added Tax (Tour Operators) Order 1987. The provisions of national legislation were defined more precisely by Notice 709/5/88 and then by Notice 709/5/96 of the Commissioners of Customs & Excise on the Tour Operators' Margin Scheme ('TOMS'). This 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.

The main proceedings and the questions referred for a preliminary ruling

6 MyTravel sells package holidays to be taken in foreign countries. It invariably buys in the accommodation from third parties. However, as it has its own airline, it generally uses its own aircraft to take holidaymakers to their destinations. It also sells individual aeroplane tickets to the public, referred to as 'seat-only' sales, for seats on its own aircraft or seats bought in from other airlines, and sells seats on planes to other tour operators ('broked seats'). It declared its VAT liability for the years 1995 to 1999 using the TOMS method. Following the judgment in *Madgett and Baldwin*, cited above, it recalculated its VAT liability for the years 1995 to 1997, taking as a basis the market value of seats sold as part of package holidays.

7 To obtain that market value, MyTravel used two methods. For 1995 and, it seems, for 1996, it began with the cost of aeroplane seats sold as part of packages, to which it added a percentage mark-up equal to the mark-up that it claims to have achieved on seat-only sales in the same period. In 1995, MyTravel also sold packages including cruises, fly-drive and campsite accommodation. However, it recalculated its liability applying the market value criterion only in respect of flights, taking the view that it had no appropriate comparator for the other in-house supplies.

8 For 1997, MyTravel, using an internal document called the 'Route Profitability Report', calculated the average across-the-board revenue obtained by it for aeroplane tickets sold to the public not as part of packages, arriving at a figure of GBP 153. According to MyTravel, this sum applies to all the seats sold.

9 Having recalculated on those bases the cost of seats on flights sold as part of package holidays, MyTravel claimed from the Commissioners of Customs & Excise the repayment of GBP 212 000, GBP 2 004 857 and GBP 711 051 in respect of 1995, 1996 and 1997 respectively. The sums claimed are substantial inter alia because the effect of the method used by MyTravel is to increase the proportion of the package price attributed to transport which, under the applicable national law, is zero-rated.

10 The Commissioners of Customs & Excise rejected MyTravel's claims. As they argued before the VAT and Duties Tribunal, *Madgett and Baldwin* indicates in their submission that, when identifying the part of the package relating to in-house supplies, the market value method cannot be used where, as in the case of MyTravel, it does not have the advantage of simplicity, it produces an artificial figure for the margin on supplies bought in from third parties and it significantly changes the VAT liability. They argued, further, that that judgment does not provide ground for using such a method selectively and that GBP 153 was not the market value of aeroplane seats sold as part of packages.

11 MyTravel stated, on the other hand, that in *Madgett and Baldwin* the Court rejected the argument that the criterion of actual costs amounts to a more reliable indicator of the values of different elements in a package. MyTravel also argued that it cannot be required that both methods produce identical VAT liabilities, since that would oblige traders to do the calculations for both methods. As regards the ground of that judgment relating to the fact that the market value method is simpler, that was just a factor taken into account in reaching the solution adopted and not a condition to which the use of that method is subject.

12 MyTravel considers that it is entitled to use the market value method where it has an appropriate comparator, as is the case for flights, and that Article 26 of the Sixth Directive does not preclude it from using that method and the actual cost method at the same time. As for the sum of GBP 153, it reflects the average value of all seat-only sales and can serve as a basis for pricing journeys sold as part of packages, since in *Madgett and Baldwin* the Court required the trader to set the market value of in-house services not by reference to identical services but on the basis of similar services.

13 In those circumstances, the VAT and Duties Tribunal, Manchester, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In what, if any, circumstances is it open to a tour operator, which has completed its [VAT] return for a financial year using the actual cost method which was the only method laid down in national legislation implementing the Directive, subsequently to recalculate its VAT liability partly in accordance with the market value method described in paragraph 46 of [the judgment in *Madgett and Baldwin*]?

(a) In particular may such a tour operator use the market value selectively in relation to different financial years, and, if so, in what circumstances?

(b) In a case where the tour operator sells some of the in-house components of its packages to the public on a non-package basis (in this case flights) but

does not sell other in-house components of some of its packages to the public on a non-package basis (in this case cruises and campsites) can the tour operator:

— use the market value method in relation to those packages (being the vast majority) where it can determine the value of all its in- house supplies (in this case flights) by reference to sales it has made to the public on a non-package basis;

— in cases where the package includes in-house elements which the tour operator does not sell to the public on a non-package basis (in this case campsites and cruises), can the tour operator use the market value method to determine the value of those in-house supplies that it does sell to the public (in this case the flights) where it has not been possible to establish a market value for other parts of the package?

(c) Must the use of the combination of methods be (a) simpler or (b) significantly simpler or (c) not significantly more complicated?

(d) Must the market value method produce the same, or a very similar, VAT liability as does the cost-based method?

(2) Is it possible in the circumstances of the present case to identify that part of the in-house service relating to flights sold as part of a holiday package by taking

either (a) the average cost of an airline seat increased by the average margin achieved by the tour operator on seat-only sales in the financial year in question or (b) the average revenue achieved by the tour operator on seat-only sales in the financial year in question?'

Consideration of the questions

The first question

14 By its first question, which is subdivided into several parts, the VAT and Duties Tribunal essentially asks whether, and in what circumstances, a tour operator such as MyTravel may recalculate the taxable margin as referred to in Article 26 of the Sixth Directive in accordance with the market value method described in the judgment in *Madgett and Baldwin*.

The first part of the first question

15 It needs to be examined whether a tour operator who has completed his VAT return for a tax period using the method laid down by the national rules transposing the Sixth Directive is entitled to recalculate his VAT liability pursuant to a judgment of the Court, in accordance with the method held in that judgment to comply with the Sixth Directive.

16 When the Court, in the exercise of the jurisdiction conferred on it by Article 234 EC, interprets a provision of Community law, it defines the meaning and scope of that provision as it ought to have been understood and applied from its entry into force (see, to this effect, Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 16; Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 39; and Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 21). The only circumstances where that is not the case are where, exceptionally, the Court limits the temporal effect of that interpretation in its judgment (see, to this effect, *Denkavit italiana*, cited above, paragraph 17; Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 74; and, for a recent application of those principles with regard to VAT, Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraphs 41 to 45).

17 A judgment delivered on a reference for a preliminary ruling is such as to have effects on legal relationships which arose before its delivery. It follows, in particular, that a rule of Community law so interpreted must be applied by an administrative body within the sphere of its competence even to legal relationships which arose and were formed before delivery of the Court's judgment ruling on the question referred to it (see, to this effect, *Kühne & Heitz*, cited above, paragraph 22). In the absence of Community rules on applications for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which such applications may be made; those conditions must observe the principles of equivalence and effectiveness, that is to say, they must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the Community legal order (see, to this effect, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraph 103).

18 The answer to the first part of the first question must therefore be that a travel agent or a tour operator who has completed his VAT return for a tax period using the method laid down by the national rules which transpose the Sixth Directive into domestic law may recalculate his VAT liability in accordance with the method held

by the Court to comply with Community law, under the conditions laid down by national law, which have to observe the principles of equivalence and effectiveness.

The other parts of the first question

19 It should be examined first whether apportionment of the package price by a taxable person covered by Article 26 of the Sixth Directive, using the criterion of market value for in-house services, is subject to the condition that its use must in fact be simpler in the specific circumstances of that taxable person and that it produces a VAT liability similar to that which would be obtained from the criterion of actual costs.

20 With regard to the criterion of simplicity, MyTravel observes that if use of that method for determining the VAT payable by a travel agent or a tour operator were made subject to the condition that, in the specific circumstances of each taxable person, the method must in fact be simpler than the actual cost method, this would effectively make determination of the taxable amount, which constitutes a fundamental element of the VAT system, dependent on an assessment marked by uncertainty and a degree of subjectivity.

21 On the other hand, the United Kingdom Government submits that a taxable person such as MyTravel cannot amend its VAT returns by applying the criterion of market value, on the ground that it was able to draw them up without particular difficulty using the criterion of actual costs and that that amendment has the effect of reducing its tax liability significantly.

22 As the Advocate General has observed in point 51 of his Opinion, it is clear from paragraph 45 of the judgment in *Madgett and Baldwin* that the reasons why the Court considered that the market value method had the advantage of simplicity did not relate to the particular circumstances of that case.

23 Accordingly, use of the criterion of market value is not subject to the condition that it must be simpler than use of the actual cost method.

24 With regard, next, to the amount of the VAT liability, it must be examined whether use of the market value method is subject to the condition that it must produce a VAT liability identical or similar to the liability that would have been obtained using the method based on the actual cost of the services.

25 The United Kingdom Government submits that when the Court, in paragraphs 45 and 46 of the judgment in *Madgett and Baldwin*, permitted use of the market value method, it was influenced by the fact that it expected that method to produce a VAT liability comparable to that calculated using the actual cost method.

26 It must be stated that the fact that those two methods result in calculation of a similar tax liability seems, inasmuch as it appears between dashes in paragraph 46 of the judgment in *Madgett and Baldwin*, to be a superfluous factor.

27 Furthermore, the contrary interpretation, argued for by the United Kingdom Government, would have the effect of obliging taxable persons, after they have drawn up their tax return in accordance with the market value method, to carry out in any event the calculations necessary for working out the VAT liability under the actual cost method, thus limiting the usefulness of the market value method.

28 Accordingly, the use by a taxable person covered by Article 26 of the Sixth Directive who supplies to travellers, in return for a package price, services bought in from third parties and in-house services of the criterion of market value to apportion that package price is not subject to the condition that it must produce a VAT liability comparable to that which would be obtained using the criterion of actual costs.

29 It must be examined whether the decision to use the criterion of market value, where the market value can be established, has to be left to the taxable person's discretion.

30 It is to be remembered that the basic principle of VAT is that it is a consumption tax designed to be borne only by the final consumer. VAT is precisely proportional to the price of the goods and services and it is collected by taxable persons at each stage of the production or distribution process on behalf of the tax authorities, to which they are required to pay it. In accordance with the basic principle of that system and the detailed rules for its operation, the VAT to be levied by the tax authorities must be equal to the tax actually collected from the final consumer (see, to this effect, Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraphs 18 to 24). The conditions governing the application of the special scheme established by Article 26 of the Sixth Directive for travel agents and tour operators when the taxable person supplies to the traveller in return for a package price both services bought in from third parties and in-house services should not call into question that basic principle of the VAT system.

31 It is apparent from the judgment in *Madgett and Baldwin* that the market value method may be adopted where it is possible to identify the part of the package corresponding to the in-house service on the basis of the market value of services similar to those which form part of the package. None the less, that must not result in a taxable person being conceded the right to use that method at his own discretion, according to whether or not the effect of its use is to reduce his tax liability compared with the tax liability which would result from using the actual cost method.

32 The grant to taxable persons of such a right could have the consequence of allowing them to increase artificially the taxable amount subject to the lowest rate and of thus creating an inequality in competition between businesses, in favour of those which have established their business or have a fixed establishment in a Member State which taxes certain transactions at very low rates or even zero-rates them, as in the United Kingdom in relation to passenger transport. Such an interpretation could, therefore, run counter to the principle of neutrality of VAT.

33 As is apparent from the ninth recital in the preamble to the Sixth Directive, the Community legislature wished the taxable base to be harmonised 'so that the application of the Community rate to taxable transactions leads to comparable results in all the Member States'. This harmonisation is thus intended to ensure that situations similar from an economic or commercial point of view are treated identically as regards application of the VAT system. The harmonisation thus helps to ensure the neutrality of that system.

34 As the Advocate General has stated in point 68 of his Opinion, the Commission of the European Communities is justified in its view that the apportionment of the package price between services bought in from third parties and in-house services should be made on the basis of the market value of the latter services where that value can be established. On the other hand, as the Advocate General has also

observed in point 69 of his Opinion, it is difficult to rule out altogether the option of derogating from that principle. Accordingly, it is acceptable for a travel agent or tour operator who is able to prove that the actual cost method accurately reflects the actual structure of the package to apportion his package prices using that method rather than the market value method.

35 Thus, a travel agent or tour operator who, in return for a package price, supplies to a traveller services bought in from third parties and in-house services must, in principle, identify the part of the package corresponding to his in-house services on the basis of their market value where that value can be established, unless he can prove that, for the tax period under consideration, the method based on the criterion of actual costs accurately reflects the actual structure of the package.

36 In addition, it is for the national tax authorities and, where appropriate, the national court or tribunal, to assess whether it is possible to identify the part of the package corresponding to the in-house services on the basis of their market value, and in this context to determine the most appropriate market.

37 Finally, the VAT and Duties Tribunal asks, in essence, how to apportion the package price where the taxable person is not in a position to establish the market value of certain in-house services, because he does not sell similar services on a non-package basis. It accordingly asks whether, in such circumstances, this criterion applies none the less to the in-house services whose market value can be ascertained.

38 As the Advocate General has observed in point 77 of his Opinion, the fact that a market value cannot be established for all the in-house services supplied by the

taxable person cannot justify a derogation from the application of that criterion in order to establish the value of services whose market value can be ascertained. In such a case, it is true that the taxable person is obliged to apportion the package price using both methods of calculation for the in-house services. None the less, this combination of the two methods should not entail insurmountable practical difficulties.

39 Moreover, as the Advocate General has observed in point 79 of his Opinion, although the purpose of Article 26 of the Sixth Directive is to adapt the rules applicable in respect of VAT to the specific nature of the work of a travel agent and thus reduce the practical difficulties which might hamper such work, the scheme established by that article, unlike that set up for small undertakings and farmers, is not intended to simplify the accounting requirements entailed by the normal VAT scheme. Thus, Article 26(3) provides that where transactions entrusted by the travel agent to other taxable persons are performed both inside and outside the European Community, only that part of the package price relating to transactions outside the Community is exempted. The implementation of such a provision may also require travel agents to make fairly technical apportionments of their package prices.

40 Accordingly, there is not sufficient justification, in an instance such as that in the main proceedings, for not applying the criterion of market value. A taxable person may therefore, in the same tax period, apply the criterion of market value to certain services and not to others where he is not able to establish the market value of those other services.

41 The answer to the other parts of the first question has to be, therefore, that Article 26 of the Sixth Directive must be interpreted as meaning that a travel agent or tour operator who, in return for a package price, supplies to a traveller services bought in from third parties and in-house services must, in principle, identify the part of the

package corresponding to his in-house services on the basis of their market value where that value can be established. In such a case, a taxable person may use the criterion of actual costs only if he proves that this criterion accurately reflects the actual structure of the package. Application of the criterion of market value is not subject to the condition that it must be simpler than application of the actual cost method or to the condition that it must produce a VAT liability identical or close to that which would result from using the actual cost method. Accordingly:

— a travel agent or tour operator may not use the market value method at his own discretion and

— that method is applicable to in-house services whose market value may be established even if, in the same tax period, the value of certain in-house components of the package cannot be established inasmuch as the taxable person does not sell similar services on a non-package basis.

The second question

42 By its second question, the VAT and Duties Tribunal asks whether, in the circumstances of the main proceedings, it is possible to identify that part of the in-house service relating to flights sold as part of holiday packages by taking either the average cost of an airline seat increased by the average margin achieved by the tour operator on seat-only sales in the course of the financial year in question or the average revenue achieved by the tour operator on seat-only sales in the financial year in question.

43 Under Article 234 EC, the Court has no power to apply rules of Community law to a particular case, but only to rule on the interpretation of the EC Treaty and of acts adopted by Community institutions (see, inter alia, Case 100/63 *Van der Veen* [1964] ECR 565, at 572; Case 24/64 *Dingemans* [1964] ECR 647, at 652; Joined Cases C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267, paragraph 30; Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 15; Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 29; and Case C-203/99 *Veedfald* [2001] ECR I-3569, paragraph 31). Nevertheless, in the context of interpretation of Article 26 of the Sixth Directive and given the information already produced on the method of apportioning the package price where the taxable person supplies services bought in from third parties and in-house services, an answer should be given to the second question inasmuch as it is designed to ascertain whether it is possible to take average values as a basis for establishing market value.

44 As the Advocate General has stated in point 86 of his Opinion, there is nothing to preclude such a practice. An average value may prove more representative where, as in the main proceedings, there is significant variation in the prices of similar services sold on a non-package basis. The VAT and Duties Tribunal, which has the task of identifying in each individual case the value that best reflects the spirit of the Sixth Directive, may thus legitimately establish the market value of flights sold by MyTravel as part of package holidays on the basis of the average selling price of aeroplane tickets sold by that taxable person for the same destination or a comparable destination. It will be for that tribunal to make the necessary corrections to those averages to take into account, for example, the fact that, as part of packages, seats on flights are offered free or at reduced prices for passengers' children.

45 Having regard to the foregoing, the answer to the second question must be that it is for the national tribunal to establish, in the light of the circumstances of the main proceedings, the market value of the flights supplied in the main proceedings as part of package holidays. The national tribunal may establish this market value from

average values. In this context, the market based on seats sold to other tour operators may constitute the most appropriate market.

Costs

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

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

1. **A travel agent or a tour operator who has completed his value added tax return for a tax period using the method laid down by the national rules which transpose into domestic law 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 may recalculate his value added tax liability in accordance with the method held by the Court to comply with Community law, under the conditions laid down by national law, which have to observe the principles of equivalence and effectiveness.**

2. **Article 26 of Sixth Directive 77/388 must be interpreted as meaning that a travel agent or tour operator who, in return for a package price, supplies to**

a traveller services bought in from third parties and in-house services must, in principle, identify the part of the package corresponding to his in-house services on the basis of their market value where that value can be established. In such a case, a taxable person may use the criterion of actual costs only if he proves that this criterion accurately reflects the actual structure of the package. Application of the criterion of market value is not subject to the condition that it must be simpler than application of the actual cost method or to the condition that it must produce a value added tax liability identical or close to that which would result from using the actual cost method. Accordingly:

— **a travel agent or tour operator may not use the market value method at his own discretion and**

— **that method is applicable to in-house services whose market value may be established even if, in the same tax period, the value of certain in-house components of the package cannot be established inasmuch as the taxable person does not sell similar services on a non-package basis.**

3. **It is for the national tribunal to establish, in the light of the circumstances of the main proceedings, the market value of the flights supplied in the main proceedings as part of package holidays. The national tribunal may establish this market value from average values. In this context, the market based on seats sold to other tour operators may constitute the most appropriate market.**

[Signatures]