Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 18 July 2013 [1]

Case C-300/12

Finanzamt Düsseldorf-Mitte
v
Ibero Tours GmbH

(Request for a preliminary ruling from the Bundesfinanzhof (Germany))

(Value added tax — Operations of travel agents — Granting of price discounts to customers, resulting in a reduction in the commission for the travel agent — Determination of the taxable amount for the intermediary service)

I – Introduction

1. This request for a preliminary ruling, received at the Court on 20 June 2012, essentially seeks to ascertain whether, and if necessary under what conditions, the principles established in *Elida Gibbs* [2] in respect of price discounts granted by a manufacturer through a distribution chain are also applicable where an intermediary grants price reductions to consumers. These proceedings arise in a situation where a travel agent, acting as an intermediary between the tour operator and consumers, granted consumers reductions in travel prices and sought to deduct them from its taxable amount for the purposes of value added tax ('VAT').

II – Legislative framework

A – *EU law*

2. Under Article 11A(1)(a) 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 VAT Directive'): [3]

'…

1 — Original language: French.

2 — Case C-317/94 *Elida Gibbs* [1996] ECR I-5339.

3 — The Sixth VAT Directive has been amended several times in the period from 2002 to 2004, but the provisions which are relevant to the present case were not affected. In this Opinion I am therefore reproducing the wording of the directive as it appeared in the consolidated version of 1 January 2001, which was in force at the beginning of the period at issue in the present case.

1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, 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 including subsidies directly linked to the price of such supplies'.

3. Under Article 11A(3) of the Sixth VAT Directive:

'The taxable amount shall not include:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply;

...'

4. The first subparagraph of Article 11C(1) of the Sixth VAT Directive, entitled 'Miscellaneous provisions', stipulates:

'In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.'

5. Article 26 of the Sixth VAT Directive, entitled 'Special scheme for travel agents', provides:

'1. Member States shall apply [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 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. [VAT] 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.'

B – *German law*

6. Paragraph 17(1) of the Law on turnover tax (Umsatzsteuergesetz, 'the UStG') in the version in force from 1 January 2002 to 15 December 2004 provided:

'When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1)(1) has changed,

(1) the trader who made the supply shall adjust correspondingly the amount of tax payable and

(2) the trader who received the supply shall adjust correspondingly the amount of input tax deductible in that regard;

that shall apply by analogy in the case of Paragraph 1(1)(5) and of Paragraph 13b. Adjustment of the deduction of input tax may be waived where a third-party trader pays to the tax authority the amount of tax corresponding to the reduction in remuneration; in that case the third-party trader is liable to pay the tax. ...'

7. Paragraph 17(1) of the UStG in the version in force from 16 December 2004 provides:

'When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1)(1) has changed, the trader who made the supply shall adjust correspondingly the amount of tax payable. The trader who received the supply shall also adjust the amount of input tax deductible in that regard. This shall not apply if the trader is not placed at an economic advantage by the change in the taxable amount. If in such cases another trader is placed at an economic advantage by the change in the taxable amount, that trader must adjust the amount of deductible input tax. The first to fourth sentences shall apply by analogy in the case of Paragraph 1(1)(5) and of Paragraph 13b. Adjustment of the amount of deductible input tax may be waived where a third-party trader pays to the tax authority the amount of tax corresponding to the reduction in remuneration; in that case the third-party trader is liable to pay the tax …'

III – The dispute in the main proceedings and the questions referred for a preliminary ruling

8. The diagram below, which shows the figures from the example used by the referring court, that is to say, the Bundesfinanzhof (Federal Finance Court, Germany), and the European Commission,[4] will make it easier to describe and understand the facts in the present case.

9. Ibero Tours GmbH ('Ibero Tours') is a German travel agent which offers its clients travel services designed by tour operators. According to the example used by the referring court and the Commission, the gross price of travel is EUR 2 000, including VAT of EUR 275.86. Once the travel has been sold, the tour operator provides the travel service to the client and pays the travel agent a commission as a consideration for its intermediary service. In the example, the gross amount of the commission is EUR 232, including EUR 32 in VAT.

10. In order to promote sales, Ibero Tours grants clients reductions in the travel price. In the example, it is presumed that that travel agent offers the consumer a reduction of 3% in the gross travel price, i.e. EUR 60. The reduction is not borne by the tour operator, but by that travel agent.

4 — The respondent in the main proceedings uses different figures.

11. In the above example, the consumer pays Ibero Tours the agreed reduced price, namely EUR 1 940. The travel agent then pays the tour operator a sum corresponding to the difference between the total travel price (excluding the reduction, i.e. EUR 2 000) and the commission calculated on the basis of the non-reduced travel price (inclusive of VAT, i.e. EUR 232), which also corresponds to the difference between the reduced price paid by the client (EUR 1 940) and the reduced amount of the commission (EUR 172) following the deduction of the reduction granted to the consumer by Ibero Tours (EUR 60, inclusive of VAT). In the example, that sum corresponds to EUR 1 768 (i.e. EUR 2 000 – EUR 232 = EUR 1 768 or EUR 1 940 – EUR 172 = EUR 1 768).

12. Under the special scheme for travel agents in Article 26 of the Sixth VAT Directive, the tour operator must pay the tax authorities VAT on the total travel price and may not take into account the reduction granted by the travel agent to the client, since the travel takes place within the European Union. [5]

13. Previously, Ibero Tours had paid the tax authorities the VAT (EUR 32 in the example) applied to the full amount of the commission paid by the tour operator, i.e. EUR 232 in the example, without deducting from it the VAT of EUR 8.28 contained in the reduction granted to the final consumer, i.e. EUR 60 in the example. It took the view that it had thus been taxed on an amount in excess of the sum that it had ultimately received. It also took the view that this had enabled the tax authorities to receive an amount higher than the VAT actually paid by the final consumer. On the basis of the example, it considered that it was entitled to a reimbursement of EUR 8.28, which represents the difference between the VAT calculated on the commission which it receives not taking into account the reduction in the travel price (EUR 32) and on the commission which it retains after including in the calculation the reduction granted to the consumer (EUR 23.72).

14. Against this background, Ibero Tours applied to the Finanzamt Düsseldorf-Mitte (Tax Office, Düsseldorf-Mitte; 'the Finanzamt') for an adjustment of the VAT assessments for the relevant years 2002 to 2005, arguing that giving the price reductions to the travel clients had led to a reduction in remuneration for the intermediary services which it provided to the tour operators pursuant to Paragraph 17 of the UStG.

15. The Finanzamt granted that application only to the extent that the services provided by the tour operators were liable to tax on the basis of the conditions of the special scheme pursuant to Article 26 of the Sixth VAT Directive. To the extent that the services provided by the tour operators were exempt under Article 26(3) of the Sixth VAT Directive, however, the Finanzamt refused to make an adjustment in favour of Ibero Tours. Following an unsuccessful objection, Ibero Tours brought an action which the Finanzgericht (Finance Court) allowed. The Finanzamt challenged that judgment of the Finanzgericht by means of an appeal on a point of law.

16. In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) According to the principles of the judgment of the Court of Justice of the European Union in Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, does it also result in a reduction of the taxable amount within the context of a distribution chain if an intermediary (here, a travel agent) refunds to the customer (here, a travel client) in the transaction arranged by him (here, services of the tour operator provided to the travel client) part of the price for the transaction arranged?

(2) In the event that Question 1 is answered in the affirmative, must the principles of the judgment of the Court of Justice of the European Union in Case C-317/94 *Elida Gibbs* [1996] ECR I-5339 also be applied if the tour operator's transaction which has been arranged by the intermediary

5 — Case C-149/01 *First Choice Holidays* [2003] ECR I-6289.

falls within the special scheme under Article 26 of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (77/388/EEC) but the intermediary services of the travel agent do not fall within that provision?

(3) In the event that Question 2 is also answered in the affirmative, in the event of the exemption of the services arranged by the intermediary, is a Member State which has correctly transposed Article 11C(1) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (77/388/EEC) authorised to refuse a reduction of the taxable amount only if in exercising the authority included in that provision it has provided for additional conditions on the refusal of the reduction?'

IV – The procedure before the Court

17. The request for a preliminary ruling was lodged at the Court on 20 June 2012. Ibero Tours, the German Government, the United Kingdom Government and the Commission submitted written observations and presented oral argument at the hearing on 5 June 2013.

V – Analysis

A – *The first question*

18. By its first question, the referring court is seeking to ascertain whether, in relation to the provision of a service, a price reduction granted to a final consumer by an intermediary must, in the light of the judgment in *Elida Gibbs*, be treated in the same way as a similar price reduction granted by the manufacturer of goods.

19. In that judgment, the Court dealt with a promotion campaign for toiletries in which the manufacturer operated two kinds of promotion scheme.

— Under the first scheme, the manufacturer issued a money-off coupon to the final consumer with a promise to refund the face value of that coupon to the wholesaler or retailer who sold the product to the final consumer if that wholesaler or retailer agreed to accept the coupon from the final consumer as part payment for the manufacturer's products. With this scheme, the net amounts paid and received by the intermediary were not affected.

— Under the second scheme, the manufacturer issued a cash-back coupon to the final consumer (where the coupon was generally affixed to the products so that it also served as proof of purchase) and refunded direct to him the face value of that coupon. In this variant too, the net amounts paid down and received by the intermediary were not affected.

20. In that case, the Court ruled that, in those circumstances, the taxable amount for the purposes of VAT was equal to the selling price charged by the manufacturer, less the amount indicated on the voucher and refunded to the retailer or to the consumer.[6] The Court thus accepted the principle that the manufacturer may reduce his taxable amount for VAT where he bears the price reduction granted to the final consumer after the sale of its products to wholesalers and retailers. The fact that the manufacturer's sales to wholesalers and retailers had been made at prices which did not include the reductions ultimately granted to the consumer could not have any effect on the manufacturer's right to claim the reduction of his taxable amount.

6 — *Elida Gibbs*, paragraphs 34 and 35.

21. In the present case, the referring court and the German Government doubt whether the principles set out in *Elida Gibbs* are applicable in the present case as the intermediary services are not part of the same 'distribution chain' in which similar services are supplied repeatedly and under the same taxation conditions.

22. In particular, the German Government takes the view that, in the present case, the principal service is the travel service to the final consumer which is provided by the tour operator. It considers that Ibero Tours is an intermediary which simply works to establish this commercial relationship, for which it receives its commission, but without exerting any influence over the principal transaction.

23. On this basis, the German Government and the United Kingdom Government argue that the final consumer of the intermediary's service is the tour operator and not the final consumer of the principal service, which leads to a triangular arrangement in which the tour operator is the provider of the principal service for the 'travel client', in this case the trip, and the travel agent is the provider of another intermediary service supplied to the tour operator.

24. In the opinion of the German Government, as expressed at the hearing, the existence in the present case of a distribution chain which would allow the present case to be compared to the case leading to the judgment in *Elida Gibbs* is inconceivable. In its view, in the present case the travel agent offers the tour operator a service which disappears once it is supplied, as the travel service offered by the tour operator to the consumer is not at all the same as the intermediate service provided by the travel agent to the tour operator. In contrast, according to the German Government, the case leading to the judgment in *Elida Gibbs* concerned a goods distribution chain which clearly still existed after the goods were supplied by the manufacturer to the intermediary and by the intermediary to the consumer.

25. I do not concur with this view. As the Commission points out, there is no reason to rule out the application of the principles set out in *Elida Gibbs* and thus to refuse the reduction to an intermediary where the conditions in which a manufacturer or an intermediary would benefit from the reduction of the taxable amount are otherwise identical.

26. The argument that Ibero Tours is not part of the value chain which ends when the final consumer receives a service subject to VAT ignores reality. Even though, in very formalistic terms, a travel agent like Ibero Tours provides intermediary services to the tour operator in return for a commission, it is the travel agent that offers the discount to the consumer and bears the financial burden.

27. Contrary to the claims made by the United Kingdom Government, the price reduction which the travel agent offers to the consumer translates, *de facto* and in economic terms, into a reduction in the commission which the tour operator pays it. The commission is still the only revenue which the travel agent obtains from its involvement in providing the travel service to the consumer and the reduction which it offers the consumer necessarily reduces the amount of its commission. Otherwise, the reduction would be borne by the tour operator, to which the travel agent, in the above example, would pay only EUR 1 940, reduced by EUR 232, or EUR 1 708, which would not be what was agreed between the parties. In the main proceedings, the travel agent is therefore in the same situation as the manufacturer in *Elida Gibbs*.

28. As the Court stated in that judgment, 'in order to ensure observance of the principle of neutrality, account should be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer, grants the consumer a reduction through

retailers or by direct repayment of the value of the coupons. Otherwise, the tax authorities would receive by way of VAT a sum greater than that actually paid by the final consumer, at the expense of the taxable person.' [7]

29. Even though the Court regarded the taxable person as 'the first link in a chain of transactions', that is a reference to the facts of the case leading to the judgment in *Elida Gibbs*, in which the manufacturer offering the price reduction to the final consumer was at the start of the value chain, rather than a statement of a prerequisite for benefitting from the reduction in the taxable amount.

30. If the position taken by the referring court and by the German Government were accepted, account would not be taken of the fact that the price reduction offered to the consumer resulted, in economic terms, in a reduction in the commission received by Ibero Tours and, consequently, Ibero Tours would be required to pay VAT calculated on the basis of a higher turnover than that finally achieved. [8]

31. Such an outcome would be unacceptable in the light of the Court's case-law. The Court ruled in *Elida Gibbs* that 'having regard in each case to the machinery of the VAT system, its operation and the role of the intermediaries, the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer'. [9]

32. In order to avoid this outcome, as the Court has already held, the taxable amount for the purposes of VAT must include the reduction in the sum finally received by the intermediary: 'although the manufacturer may in fact be regarded as a third party as regards the transaction between the retailer who receives reimbursement of the value of the voucher and the final consumer, that reimbursement entails a corresponding reduction in the amount finally received as consideration for the supply by him and that consideration constitutes, pursuant to the principle of VAT neutrality, the basis for calculating the tax for which he is liable'. [10]

33. The answer to the first question must therefore be that the principles relating to the reduction of the taxable amount in the case of undertakings which grant price reductions to the consumer of a downstream service, as laid down in *Elida Gibbs* are also applicable in the case of an intermediary (here, a travel agent) which, at its own expense, grants a price reduction to the customer (here, a travel client) in the transaction arranged by that intermediary (here, services of the tour operator).

B – *The second question*

34. By its second question, the referring court asks the Court whether or not, in the case of principal services coming under Article 26(2) of the Sixth VAT Directive, the judgment in *Elida Gibbs* is inapplicable, either on account of the particular features of that article, which regards 'the travel agent's margin' as the taxable amount ('the margin scheme'), contrary to Article 11A(1)(a) of that directive, which defines as the taxable amount 'the consideration which has been ... obtained from the purchaser' ('the consideration scheme') (heading 1 below), or because those services are, in some cases, constituent elements of an overall (mixed) service which also includes other elements (heading 2 below).

7 — Ibid., paragraph 31.

8 — Ibid., paragraph 24. See also Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315, paragraph 45.

9 — *Elida Gibbs*, paragraph 24.

10 — *Commission* v *Germany*, paragraph 45.

1. The case of principal services coming under Article 26(2) of the Sixth VAT Directive entitled 'Special scheme for travel agents'

35. In the case leading to the judgment in *Elida Gibbs* the taxable amount was calculated pursuant to Article 11A(1)(a) of the Sixth VAT Directive, i.e. on the basis of the consideration scheme. The present case, on the other hand, falls within the scope of Article 26 of that directive, which provides for a special taxation scheme for travel agents. The referring court asks whether the judgment in *Elida Gibbs* is still applicable in the present case in so far as, unlike that case where the taxable amount was calculated under the consideration scheme, the taxable amount in the present case must be calculated under the margin scheme.

36. According to the referring court, where the service comes under the margin scheme, the calculation of the taxable amount under Article 11A(1)(a) of the Sixth VAT Directive is no longer possible, as the taxable amount is equal, not to the consideration paid by the consumer, but to the difference between the total amount paid by the traveller, exclusive of VAT, and the actual cost to the travel agent of supplies of goods and services provided by other taxable persons where these transactions are for the direct benefit of the traveller. The referring court and the German Government point out that it must also be taken into account that the margin may even amount to zero if the costs incurred for the journey cannot be achieved on the market.

37. As the Commission argues, that distinction is irrelevant in the case before the Court. As the Court has ruled, '[b]y laying down a single place of taxation and using as the taxable amount for VAT the travel agent's or tour operator'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, including VAT, to the travel agent or tour operator of supplies and services provided by other taxable persons, Article 26(2) of the Sixth [VAT] Directive is designed to avert the difficulties referred to in the previous paragraph [11] and especially to provide a simplified method of deducting input tax, whichever the Member State in which it was collected'. [12]

38. However, the Court also ruled as follows:

'26. The attainment of that objective in no way requires any derogation from the rule laid down in Article 11A(1)(a) of the Sixth [VAT] Directive which, for the purposes for determining the taxable amount, refers to "the consideration which has been or is to be obtained by the supplier from the ... customer or a third party".

27. That "consideration" is the same economic element as the "total amount to be paid by the traveller" mentioned in Article 26(2) of the Sixth [VAT] Directive. Under both the general scheme and the special scheme, that element corresponds to the price paid to the supplier of the services. Irrespective of the objective pursued by Article 26(2), the concept in question must have the same legal definition under both schemes.' [13]

39. Furthermore, it should be pointed out that *First Choice Holidays* concerned similar facts to those in the main proceedings. First Choice Holidays organised package holidays by combining various component elements which it bought. It left travel agents to sell the final product to customers under agency agreements. As in the present case, the price reduction was offered to passengers by the travel agents.

11 — In the previous paragraph, the Court refers to the difficulty of applying the normal rules on place of taxation, taxable amount and deduction of input tax by reason of the multiplicity of services and the places in which they are provided and the practical difficulties for those undertakings, which are of such a nature as to obstruct their operations (see *First Choice Holidays*, paragraph 24).

12 — *First Choice Holidays*, paragraph 25.

13 — Ibid., paragraphs 26 and 27.

40. In this factual context, Advocate General Tizzano had observed that '[t]he fact that the method employed for calculating the taxable amount is not the same under the two schemes does not imply that the factors to be taken into consideration for that purpose are also different'. [14]

41. Similarly, the fact that the two schemes for calculating the taxable amount are different does not mean that the application of the principles set out in *Elida Gibbs* should be ruled out where, as in the present case, there is a travel operation which falls within the scope of Article 26 of the Sixth VAT Directive.

42. Moreover, it is hardly surprising that the same result is achieved if the calculation is made either using the margin scheme or using the consideration scheme. This is demonstrated sufficiently by the example given in point 8 of this Opinion.

43. If the consideration scheme is used, the travel agent that offers the consumer a reduction of EUR 60 in the travel price on the same conditions as Ibero Tours will have to pay the tour operator EUR 1 940 (including EUR 267.58 in VAT). The gross commission payable to it will then be reduced from EUR 232 to EUR 172 (inclusive of VAT), since the reduction of EUR 60 is at its expense and is not borne by the tour operator.

44. This reduces the taxable amount for the travel agent from EUR 200 to EUR 148.28 and the VAT from EUR 32 to EUR 23.72. In this case, the difference between the amount of VAT excluding or including the reduction amounts to EUR 8.28, i.e. EUR 32 – EUR 23.72 = EUR 8.28.

45. This amount represents precisely the difference between the VAT applicable to the travel price payable by the consumer without the reduction offered by the travel agent and the VAT which he must pay after the reduction, i.e. EUR 275.86 – EUR 267.58 = EUR 8.28.

46. The result is the same if the margin scheme is applied. Assuming that, in the same situation, the tour operator has purchased the services which it offers to the consumer at a price of EUR 1 000, the difference of EUR 1 000 between the price at which it sells the travel services to the consumer and the price at which it purchases them can be broken down into a margin of EUR 862.07 and VAT at a rate of 16% on that amount totalling EUR 137.93.

47. If the travel agent grants a reduction of a gross amount of EUR 60 to the consumer, the consumer will have to pay it the amount of EUR 1 940, which includes an 'actual cost' of EUR 1 000, a 'margin' of EUR 810.35 and EUR 129.65 in VAT.

48. Even under this scheme the difference between the two amounts of VAT (without and with a reduction) is also EUR 8.28, i.e. EUR 137.93 – EUR 129.65 = EUR 8.28. It is precisely that amount that the travel agent could claim from the tax authorities if it had paid the VAT on the basis of turnover composed of the amount of commission not including the reduction offered to the consumer.

49. As the Commission explains, in the two cases, the identical amount can be explained by the fact that the EUR 60 reduction offered by the travel agent inevitably includes an amount of VAT of EUR 8.28. It is therefore clear from this example that the margin scheme also does not affect the arithmetical bases of the solution outlined in *Elida Gibbs*.

14 — Point 26 of the Opinion of Advocate General Tizzano in *First Choice Holidays*.

50. At the hearing, the German Government neither challenged the methodology for the example used by the Commission nor provided a basis for the alleged entitlement of the German tax authorities to retain the surplus of EUR 8.28 in VAT. On the contrary, as the Commission and Ibero Tours argue in their written observations, the deduction of the amount of the reduction in the travel price from the travel agent's taxable amount for the purposes of VAT ensures that the tax administration collects an amount of VAT which corresponds to the amount actually paid by the consumer.

51. If the consideration scheme is applied to the above example, the tax administration would collect EUR 243.86 from the tour operator, the difference between the VAT paid on the travel price (EUR 275.86) and the input VAT paid, which corresponds to the commission paid (EUR 32), together with EUR 23.72 from the travel agent, which represents the VAT paid on the reduced commission, that is to say a total amount of EUR 267.58. The VAT collected by the tax administration would correspond precisely to the amount of VAT charged to the final consumer on the EUR 1 940 paid by him.

52. Similarly, if the margin scheme is applied to the above example, the tax administration would collect the same amount of VAT, namely EUR 267.58, i.e. EUR 137.93 corresponding to the VAT paid by the tour operator to purchase the services which it resells to the final consumer, EUR 105.93 payable by the tour operator itself, corresponding to the difference between the VAT paid on its margin (EUR 137.93) and the VAT which it paid to the travel agent for the commission before the reduction (EUR 32), and EUR 23.72 corresponding to the VAT payable by the travel agent on the commission which it receives from the tour operator after the reduction.

53. The principles set out in *Elida Gibbs* are not therefore affected by the simple fact that, in the case mentioned in Article 26(2) of the Sixth VAT Directive, it is not the consideration which represents the taxable amount, but the margin. That is the case because, as the Court has explained, '... there is no need to readjust the taxable amount for the intermediate transactions ... since, for those transactions, observance of the principle of neutrality is ensured by application of the conditions for deduction set out in Title XI of the Sixth [VAT] Directive. Under those conditions, the intermediate links in the distribution chain, such as wholesalers and retailers, may deduct from their own taxable amount the sums paid by each to his own supplier in respect of VAT on the corresponding transaction and thus pass on to the tax authorities the part of the VAT representing the difference between the price paid by each to his supplier and the price at which he supplied the goods to his purchaser.' [15]

54. Not only is the application of the principles of the judgment in *Elida Gibbs* consistent with the application of Article 26(2) of the Sixth VAT Directive, but, moreover, such application is necessary in order to avoid the base for the calculation of the VAT payable by the manufacturer, as a taxable person, being higher than the sum which it finally received. [16] According to the Court's case-law, such a possibility would not comply with principle of neutrality. [17]

55. The referring court also envisages the possibility of a zero margin. Even though, in my view, this should not have any bearing on the reasoning, I would, like the Commission, point out that the order for reference does not mention material in the file which would suggest that this could be the case with the principal travel services arranged by Ibero Tours. I would therefore suggest that the Court does not examine the second question asked by the referring court from this perspective.

15 — *Elida Gibbs*, paragraph 33.

16 — Case C-330/95 *Goldsmiths* [1997] ECR I-3801, paragraph 15.

17 — *Elida Gibbs*, paragraph 28.

2. The case of mixed services

56. First, the referring court envisages the possibility that a certain travel service is subject in its entirety to VAT, but that different taxable amounts are applicable to the different constituent elements. The elements provided by the tour operator itself would be taxed under the general scheme, whilst the elements purchased from other taxable persons would be subject to the margin scheme.

57. Second, the referring court asks whether *Commission* v *Germany* requires that the principles set out in *Elida Gibbs* should not be applied if the last services in the distribution chain are exempt pursuant to Article 26(3) of the Sixth VAT Directive.

58. The referring court considers that these two cases are problematic in so far as, without the assistance of the tour operator, the intermediary might be unable to find out the precise composition of the travel service.

59. With regard, first of all, to the case of the tour operator's mixed services which are subject to VAT, the referring court and the German Government take the view that recognition that tour operators are entitled to deduct VAT for the intermediary's services could lead to the reimbursement of fictitious turnover tax.

60. In their view, a reduction of the taxable amount in the case of a travel service provided by an intermediary may be taken into account only in respect of the part of the travel price corresponding to the tour operator's margin, which applies, in general, only to a very small proportion of the travel price.

61. In this context, the referring court and the German Government ask in what way the intermediary may determine this proportion of VAT. They argue that intermediaries cannot make such a determination when they do not know the method of calculation used by the tour operator. Because of this technical impossibility, the principles of the judgment in *Elida Gibbs* cannot be applied.

62. This conclusion seems to be wrong. It should be borne in mind that, as Ibero Tours and the Commission have shown by their examples, the general scheme based on the consideration under Article 11A(1)(a) of the Sixth VAT Directive and the scheme based on the margin under Article 26(2) of the Sixth VAT Directive are, in principle, equivalent in regard to the principles defined in *Elida Gibbs*.

63. Where the constituent elements of a single travel service come under these two schemes, this does not require the intermediary which grants a price reduction to make a separate calculation. As the Commission points out, the question whether it can make such a calculation only with the assistance of the tour operator does not therefore arise.

64. With regard, second, to travel services where some constituent elements are subject to the margin scheme under Article 26(2) of the Sixth VAT Directive, whilst others are exempt under paragraph 3 of the same article, it is necessary to break them down. If the intermediary's price reductions render the judgment in *Elida Gibbs* applicable only for those subject to paragraph 2 of that article, this does not justify the inapplicability of that judgment to those constituent elements, on the ground that the necessary breakdown of the services, according to whether they are subject to VAT or exempt, could give rise to difficulties.

65. It is true that, where certain parts of the principal travel services are, depending on the circumstances, likely to come under Article 26(3) of that directive, it is for the intermediary to show to what extent it is not that provision, but the margin scheme (or the general scheme) which is applicable. However, there is no justification for making proof impossible by ruling out *a priori* a reduction of the taxable amount for VAT.

66. As regards the difficulties which may be encountered in providing the required proof in order to deduct VAT, the tour operators may be reluctant to communicate to their intermediaries the price of each constituent element of the travel as calculated internally, but, as the Commission argues and contrary to the claims made by the German Government, I cannot see why those undertakings would refuse to communicate their aggregated figures on an annual basis in order to permit the intermediaries to have a precise breakdown of their transactions for the reference year.

67. In any event, as Ibero Tours observed at the hearing, the theoretical difficulties raised by the referring court, the German Government and the United Kingdom Government are no reason to depart from the principles set out in *Elida Gibbs*.

68. The answer to the second question must therefore be that where a tour operator's principal transaction includes an intermediary activity, the right of the latter, on the basis of the judgment in *Elida Gibbs*, to claim a reduction of its taxable amount for VAT in respect of price reductions which it grants to consumers, is not affected by the simple fact that the principal transaction comes under the margin scheme laid down by Article 26(2) of the Sixth VAT Directive.

C – *The third question*

69. By its third question, the referring court wishes to know whether in the event of the exemption of the services arranged by the intermediary, a Member State which has correctly transposed Article 11C(1) of the Sixth VAT Directive is authorised to refuse a reduction of the taxable amount only if in exercising the authority included in that provision it has provided for additional conditions on the refusal of the reduction.

70. It must therefore be ascertained whether a Member State may refuse a reduction of the taxable amount solely on the basis of the interpretation contained in *Commission* v *Germany* without the need to provide for additional conditions. In that judgment, the Court ruled that 'by not adopting the measures necessary to allow adjustment of the taxable amount of the taxable person who has effected reimbursement where money-off coupons are reimbursed, the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of the Sixth [VAT] Directive', [18] in particular in the light of *Elida Gibbs*.

71. In that case, the German Government and the United Kingdom Government had mentioned the situation in which the supply by the retailer to the final consumer was an exempt transaction, in which case inclusion of the money-off coupon in the retailer's taxable amount could lead to over-deduction to the detriment of the tax authorities in the amount of the VAT element of the face value of the coupon. [19]

72. The Court replied that 'where, owing to an exemption, the value stated on the money-off coupon is not chargeable to tax in the Member State from which the goods are despatched, no price invoiced at that stage of the distribution chain, or at a later stage, includes VAT, which means that a reduction or a partial reduction of that price cannot in turn include a VAT element capable of giving rise to a reduction of the tax paid by the manufacturer'. [20]

18 — *Commission* v *Germany*, paragraph 79.

19 — Ibid., paragraph 62.

20 — Ibid., paragraph 64.

73. The Court added that 'as regards exempt supplies in export or intra-Community transactions, the tax authorities are able, by availing themselves of the possibilities afforded them under Article 11C(1) of the Sixth [VAT] Directive, to prevent the manufacturer from deducting from his output tax what would be a fictitious amount of VAT'. [21]

74. According the referring court, this latter passage of the judgment in *Commission* v *Germany* allows two possible interpretations.

75. On the one hand, Member States which have correctly transposed Article 11C(1) of the Sixth VAT Directive could automatically rely on that judgment to refuse the reduction of the taxable amount arising from price discounts granted in a distribution chain if the last services provided to the final consumer are exempt.

76. On the other hand, the words 'by availing themselves of the possibilities afforded them under Article 11C(1) of the Sixth [VAT] Directive' in paragraph 65 of the judgment in *Commission* v *Germany* could also be understood as meaning that, in order to refuse the reduction of the taxable amount, in the event of the exemption of the last services in the distribution chain, a Member State should adopt specific legislation in order to achieve that objective.

77. According to Ibero Tours, as the Federal Republic of Germany has not created specific conditions capable of justifying the refusal to reduce the taxable amount for VAT in exercising the authority conferred on it by Article 11C(1) of the Sixth VAT Directive, it is not therefore authorised to refuse such a reduction of the taxable amount.

78. The German Government considers that the answer to the third question must be that a Member State may refuse a reduction of the taxable amount in the event of the exemption of the services arranged by the intermediary solely on the basis of *Commission* v *Germany* and thus without laying down specific provisions in its domestic law.

79. According to the German Government, the 'conditions which shall be determined by the Member States', mentioned in Article 11C(1) of the Sixth VAT Directive under which the taxable amount is reduced, do not relate to the substantive content of the taxable amount, but only to the procedural conditions which must be met in order to claim a reduction of the taxable amount after the transaction. The German Government thus considers that the fact that the principal service constitutes a transaction which is exempt from VAT is a substantive condition for the refusal of the reduction of the taxable amount and takes the view that, in this context, national legislation does not have to determine specific conditions for refusing to grant the reduction in the case of exempt final transactions.

80. As the Court has ruled, 'the first subparagraph of Article 11C(1) of the Sixth [VAT] Directive defines the cases in which the Member States *are required* to ensure that the taxable amount is reduced accordingly, under conditions which are to be determined by the Member States themselves. That provision therefore *requires* the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person.' [22]

21 — Ibid., paragraph 65.

22 — *Goldsmiths*, paragraph 16. Emphasis added.

81. Consequently, it is clear from this passage that the Member States are required, unless recourse is had to the derogation under the second paragraph of that article (which is not the case here), to grant the reduction of the taxable amount where the conditions under that article are met. The German Government is therefore right to claim that the 'conditions which shall be determined by the Member States' can refer only to the detailed arrangements for the reduction and not to the existence of the right to the reduction. [23]

82. Accordingly, paragraph 65 of the judgment in *Commission* v *Germany* must be read from this angle. As the Commission points out, by ruling in paragraph 64 of the judgment that 'where, owing to an exemption, the value stated on the money-off coupon is not chargeable to tax in the Member State from which the goods are despatched, no price invoiced at that stage of the distribution chain, or at a later stage, includes VAT, which means that a reduction or a partial reduction of that price cannot in turn include a VAT element capable of giving rise to a reduction of the tax paid by the manufacturer', the Court was envisaging a mandatory legal consequence and not a mere possibility available to the Member States.

83. Even though, in paragraph 65 of the judgment, the Court also mentions certain 'possibilities' afforded to the Member States under Article 11C(1) of the Sixth VAT Directive, these seek merely to permit the Member States properly to ensure the tax treatment desired by that directive, since derogations from the substantive rule, which are optional and strictly defined, are dealt with separately in the second paragraph of that article.

84. This conclusion is confirmed by *Becker*, [24] in which the Court ruled, with regard to Article 13(B) of the Sixth VAT Directive entitled 'Exemptions within the territory of the country', heading B of which reads: 'Other exemptions', that the phrase 'under conditions which [the Member States] shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions', and more precisely the term 'conditions', did not 'in any way affect the definition of the subject-matter of the exemption conferred' [25] and that '[a] Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in the [Sixth VAT] Directive, upon its failure to adopt the very provisions which are intended to facilitate the application of that exemption'. [26]

85. Applying this reasoning by analogy to the present case, it is even clearer that the wording 'the conditions which shall be determined by the Member States' does not afford the Member States the possibility of laying down criteria which would influence or eliminate the taxpayer's right to the reduction of the taxable amount '[i]n the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place', [27] or would make it impossible to exercise that right in practice.

86. The correct transposition of that directive therefore means that the intermediary's taxable amount for VAT cannot be reduced where the principal service is an exempt transaction as it is inherent in the scheme of the Sixth VAT Directive that the reduction does not take place in that case, without it being necessary for the Member State to have provided for specific conditions to that end.

23 — See, to this effect, points 84 and 85 of the Opinion of Advocate General Jacobs in the case leading to the judgment in *Commission* v *Germany*.

24 — Case 8/81 *Becker* [1982] ECR 53.

25 — Ibid., paragraph 32.

26 — Ibid., paragraph 33.

27 — Article 11C(1) of the Sixth VAT Directive.

87. The answer to the third question must therefore be that, in the event of the exemption of the services arranged by the intermediary, it is inherent in the scheme of the Sixth VAT Directive for a Member State to refuse a reduction of the taxable amount for VAT without having previously included additional conditions to that end in specific legislation.

VI – Conclusion

88. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Bundesfinanzhof as follows:

(1) The principles relating to the reduction of the taxable amount in the case of undertakings which grant price reductions to the consumer of a downstream service, as laid down in the judgment of 24 October 1996 in Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, are also applicable in the case of an intermediary (here, a travel agent) which, at its own expense, grants a price reduction to the customer (here, a travel client) in the transaction arranged by that intermediary (here, services of the tour operator).

(2) Where a tour operator's transaction includes an intermediary activity, the right of the latter to claim a reduction of its taxable amount on the ground that it grants price reductions to consumers, in accordance with the judgment of 24 October 1996 in Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, is not affected by the mere fact that the principal transaction comes under the margin scheme laid down by Article 26(2) 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.

(3) In the event of the exemption of the services arranged by the intermediary, it is inherent in the scheme of Sixth Directive 77/388 for a Member State to refuse a reduction of the taxable amount for VAT without having previously included additional conditions to that end in specific legislation.