JUDGMENT OF THE COURT (Third Chamber)
12 November 1992 *

In Case C-163/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof te Amsterdam for a preliminary ruling in the proceedings pending before that court between

Fiscal group Beheersmaatschappij Van Ginkel Waddinxveen BV,

Reis- en Passagebureau Van Ginkel BV and Others

and

Inspecteur der Omzetbelasting te Utrecht

on the interpretation of Article 26 of Directive 77/388/EEC: Sixth Council Directive 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),

THE COURT (Third Chamber),

composed of: M. Zuleeg, President of Chamber, J. C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: C. Gulmann,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— Van Ginkel, by T. Braakman, of Moret Ernst and Young, tax consultants;

— the Netherlands Government, by B. R. Bot, Secretary General of the Ministry of Foreign Affairs, acting as Agent;

— the German Government, by Ernst Röder and Claus-Dieter Quassowski, of the Federal Ministry for the Economy, acting as Agents;

— the United Kingdom, by S. Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent;

— the Commission of the European Communities, by Johannes Føns Buhl, Legal Adviser, and Berend Jan Drijber, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Van Ginkel, of the Netherlands Government, represented by J. W. de Zwaan, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, of the United Kingdom, represented by D. Pannick, barrister, acting as Agent, and of the Commission at the hearing on 17 September 1992,

after hearing the Opinion of the Advocate General at the sitting on 1 October 1992,

gives the following

Judgment

1 By judgment of 4 June 1991, received at the Court on 19 June 1991, the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 26 of Directive 77/388/EEC: Sixth Council Directive 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) ('the Sixth Directive').

2 Those questions arose in proceedings between the fiscal group Beheersmaatschappij Van Ginkel Waddinxveen BV, Reis-en Passagebureau Van Ginkel BV and Others ('Van Ginkel') on the one hand and the Inspecteur der Omzetbelasting te Utrecht (inspector of turnover taxes, Utrecht) on the other, regarding a notice of adjustment of turnover tax addressed to Van Ginkel.

3 Van Ginkel trades as a tour operator and also operates travel agencies. It offers its customers what its catalogue refers to as 'motoring holidays', where the customer uses his own vehicle and Van Ginkel arranges only the travel accommodation.

4 As regards more particularly 'motoring holidays' in the Netherlands, travellers are accommodated in bungalows, most of which are owned by third parties.

5 The terms on which Van Ginkel may use these bungalows for its customers are laid down by agreements with the owners. Van Ginkel charges a commission equivalent to 20% of the letting price.

6 When the reservation is made through a travel agent other than Van Ginkel, the commission paid by Van Ginkel to that agent is between 5 and 8% of the letting price.

7 Value added tax ('VAT') is calculated solely on the basis of the amount of the commission charged by Van Ginkel, from which the amount of any commission paid to another travel agent who made the booking is deducted.

8 The inspector of turnover tax took the view that the services provided by Van Ginkel should be regarded as a letting of holiday accommodation. VAT should therefore be calculated on the basis of the total amount of the price invoiced to the customer.

9 Van Ginkel brought an action against the decision of the inspector of turnover tax before the Gerechtshof te Amsterdam, which decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions:

'1. 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)?

2. 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?'

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 To begin with, it is appropriate to specify the content and aims of the provisions of Article 26 of the Sixth Directive.

12 Article 26 of the Sixth Directive defines the special system of VAT applicable to travel agents and tour operators.

13 The services provided by these undertakings most frequently consist of multiple services, particularly as regards transport and accommodation, either within or outside the territory of the Member State in which the undertaking has established its business or has a fixed establishment.

14 The application of the normal rules on place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations.

15 In order to adapt the applicable rules to the specific nature of such operations, the Community legislature set up a special VAT scheme in Article 26(2), (3) and (4) of the Sixth Directive. Those provisions are as follows:

'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.'

16 The conditions to which the application of these special provisions is subject are laid down by Article 26(1) of the Sixth Directive, which 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.'

17 The national court's questions seek, essentially, to establish whether it is necessary to take into account, in determining whether the above provisions of Article 26 of the Sixth Directive are applicable:

— the fact that the transport of the traveller to the destination and from the place of accommodation is not arranged by the travel agent, who provides the traveller only with holiday accommodation;

— the fact that the taxable person is a tour operator.

The fact that the travel agent does not arrange transport for the traveller but provides him only with holiday accommodation

18 Van Ginkel points out that neither the Sixth Directive nor the case-law of the Court gives a precise definition of the concept of 'journey' and contends — relying on the expression 'travel facilities' used in the English version of Article 26(1) of the Sixth Directive, on the definition of 'journey' generally accepted in the Community, on business practice, on the provisions of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59), on the objectives which the Sixth Directive seeks to achieve and on the practical difficulties which a contrary interpretation would involve — that the concept of 'journey' covers holidays offered to the public by travel agents, where the agent merely reserves accommodation for the traveller.

19 The German and United Kingdom Governments also contend that it is not a condition for the application of Article 26 of the Sixth Directive that the journey in the strict sense, that is to say, the transport, should be arranged by the travel agent. It is enough that the service offered by the agent, even a single one, as pointed out

by the Advisory Committee on VAT at its 17th meeting on 4 and 5 July 1984, is in respect of a journey. To justify such an interpretation both governments also rely on the expression 'travel facilities' used in the English version of the directive and on the aims of the directive, which seeks to avoid encumbering travel agents with restraints and tax formalities in all the Member States in which services are provided.

20 The Netherlands Government, whilst admitting that a contrary interpretation is possible, contends that Article 26 of the Sixth Directive, which aims to simplify tax formalities in cases in which there are several services, is not applicable where there is a single service, in this case accommodation.

21 Article 26(1) of the Sixth Directive makes the application of that article subject to the condition that the travel agent shall deal with customers in his own name and not as an intermediary. It is for the national court before which a dispute concerning the application of these provisions is brought to inquire, having regard to all the details of the case, and in particular the nature of the travel agent's contractual obligations towards the traveller, whether or not that condition is met.

22 On the other hand, Article 26(1) of the Sixth Directive does not contain any provisions expressly requiring that, for the application of the special system of VAT envisaged by Article 26, the transport of the traveller to and from his accommodation shall be arranged by the travel agent.

23 Such a requirement would run counter to the aims of Article 26 of the directive. As has already been indicated, those provisions adapt the rules governing VAT to the specific nature of the operations of travel agents. To meet the needs of custom-

ers, such agents offer widely differing types of holidays and journeys, allowing the traveller to combine, as he wishes, transport, accommodation and any other services which those undertakings may provide. The exclusion from the field of application of Article 26 of the Sixth Directive of services provided by a travel agent on the ground that they cover only the accommodation and not the transport of the traveller would lead to a complicated tax system in which the VAT rules applicable would depend upon the constituents of the services offered to each traveller. Such a tax system would fail to comply with the aims of the directive.

24 The fact that the travel agent provides only holiday accommodation for the traveller is not, in these circumstances, sufficient to exclude that service from the field of application of Article 26 of the directive. Moreover, as the Court pointed out in Case C-280/90 *Hacker* [1992] ECR I-1111 with regard to the interpretation of Article 16(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the service offered by the agent, even where it is restricted to providing accommodation, need not be confined in such a case to a single service, since it may comprise, apart from the letting of the accommodation, services such as information and advice where the travel agent provides a range of holiday offers and the reservation of accommodation. There is therefore no reason to exclude such services from the field of application of Article 26 of the Sixth Directive, provided, however, that the owner or manager of the accommodation with whom the agent has concluded an agreement is himself, as required by the provisions of Article 26(1) of the Sixth Directive, a taxable person for the purpose of VAT.

The fact that the taxable person is a tour operator

25 As the Commission, the German, Netherlands and United Kingdom Governments and Van Ginkel have all pointed out, the special provisions of Article 26 of the Sixth Directive apply without distinction to travel agents and tour operators. Under the last sentence of Article 26(1), travel agents includes tour operators.

26 There is therefore no need to give a separate answer as regards cases in which the taxable person is a tour operator.

27 Accordingly, it should be stated in answer to the questions raised that the provisions of Article 26 of the Sixth Directive must be interpreted as meaning that the fact that transport of the traveller is not arranged by a travel agent or a tour operator and that the latter merely provides the traveller with holiday accommodation is not such as to exclude the services provided by such undertakings from the field of application of Article 26.

Costs

28 The costs incurred by the Kingdom of the Netherlands, the Federal Republic of Germany, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Gerechtshof te Amsterdam by judgment of 4 June 1991, hereby rules:

The provisions of Article 26 of Directive 77/388/EEC: Sixth Council Directive 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, must be interpreted as meaning that the fact that the transport of

the traveller is not arranged by a travel agent or a tour operator and that the latter merely provides the traveller with holiday accommodation is not such as to exclude the services provided by such undertakings from the field of application of Article 26.

Zuleeg Moitinho de Almeida Grévisse

Delivered in open court in Luxembourg on 12 November 1992.

J.-G. Giraud

Registrar

M. Zuleeg

President of the Third Chamber