Case C-200/04

Finanzamt Heidelberg

v

iSt internationale Sprach- und Studienreisen GmbH

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Sixth VAT Directive – Special scheme for travel agents and tour operators – Article 26(1) – Scope – Package comprising travel to the host State and/or the stay in that State and language tuition – Principal service and ancillary service – Definition – Directive 90/314/EEC on package travel, package holidays and package tours)

Opinion of Advocate General Poiares Maduro delivered on 16 June 2005

Judgment of the Court (Second Chamber), 13 October 2005

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Special scheme for travel agencies – Scope – Economic operators other than travel agents or tour operators offering services involving the organisation of language and study trips abroad – Included

(Council Directive 77/388, Art. 26)

According to the case?law, the underlying reasons for the special scheme for travel agents and tour operators provided for by Article 26 of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes are equally valid where the trader is not a travel agent or tour operator within the normal meaning of those terms, but effects identical transactions in the context of another activity. However, the trader should not be taxed under that article where the services bought in from third parties, in order to provide services generally associated with those operations, remain purely ancillary in relation to the in-house services.

However, where a trader habitually offers its customers travel services, in addition to services associated with the language training and education of its customers, which cannot be carried out without a substantial effect on the package price charged, such as travel to the host State and/or the stay in that State, such services are not to be equated with purely ancillary services. Such services do not represent a marginal share in relation to the corresponding services associated with the language training and education which that operator offers its customers.

In those circumstances, Article 26 of the Sixth Directive should be interpreted as meaning that it applies to a trader who offers services involving the organisation of language and study trips abroad and which, in consideration of the payment of an all-inclusive sum, provides in its own name to its customers a stay abroad of three to 10 months and buys in services from other taxable persons for that purpose.

(see paras 22, 24, 27-29, 48, operative part)

JUDGMENT OF THE COURT (Second Chamber)

13 October 2005 (*)

(Sixth VAT Directive – Special scheme for travel agents and tour operators – Article 26(1) – Scope – Package comprising travel to the host State and/or the stay in that State and language tuition – Principal service and ancillary service – Definition – Directive 90/314/EEC on package travel, package holidays and package tours)

In Case C-200/04,

Reference for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 18 March 2004, received at the Court on 5 May 2004, in the proceedings

Finanzamt Heidelberg

v

ISt internationale Sprach- und Studienreisen GmbH,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta, P. K?ris and G. Arestis (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 April 2005,

after considering the observations submitted on behalf of:

– iSt internationale Sprach- und Studienreisen GmbH, by H.-J. Philipp and R. Binder, Wirtschaftsprüfer Steuerberater, assisted by G. Wegscheider, Rechtsanwalt,

– the German Government, by A. Tiemann and C. Schulze-Bahr, acting as Agents,

– the Greek Government, by S. Spyropoulos, D. Kalogiros and M. Tassopoulou, acting as Agents,

– the Cypriot Government, by E. Simeonidou, acting as Agent,

– the Commission of the European Communities, by D. Triantafyllou and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 26 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, 'the Sixth Directive').

2 That reference was made in proceedings between the Finanzamt Heidelberg ('the Finanzamt') and iSt internationale Sprach- und Studienreisen GmbH ('iSt'), concerning the payment of value added tax ('VAT') after the inspection, by the relevant authorities, of iSt's turnover for the years 1995 to 1997.

Law

Community law

3 Article 13 which appears in Title X of the Sixth Directive, on exemptions, entitled 'Exemptions within the territory of the country', provides as follows:

'*A. Exemptions for certain activities in the public interest*

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

…

(i) children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;

…'

4 Article 26 of the Sixth Directive, entitled 'Special scheme for travel agents', which appears in Title XIV of that directive, entitled 'Special schemes', provides as follows:

'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.

…

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'.

5 According to Article 1 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59), the purpose of that directive is 'to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community'.

6 Article 2 of that directive defines 'package' as 'the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport;

(b) accommodation;

(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package'.

National law

7 The relevant provisions of national law applicable to the dispute in the main proceedings are Paragraphs 4(23) and (25) of the Law on Turnover Tax (Umsatzsteuergesetz) of 1993 (BGBl. 1993 I, p. 565, 'the UStG 1993').

8 Paragraph 4(23) of that law provides that the provision of board and lodging and other benefits in kind by persons and organisations where those services are mainly provided to young persons for education, basic training or further training purposes or for the purposes of infant child care, where the services are provided to the young persons or to persons who are involved in their education, basic training, further training or care are exempt.

9 Paragraph 25 of the UStG 1993 on the taxation of travel services provides:

'(1) The following provisions shall apply to travel services provided by an undertaking that are not provided for the purposes of the customer's business, where the undertaking deals with customers in its own name and makes use of travel-related inputs. The service provided by the undertaking is deemed to fall within the category of other services. If the undertaking provides several services of this nature to a customer in the context of one journey, those services will be deemed to be the provision of a single service falling within the other services category. The place at which the other service is provided shall be determined in accordance with Paragraph 3a(1). Travel-related inputs are supplies and other services provided by third parties which are for the direct benefit of the traveller.

(2) Other services are exempt where the travel-related inputs relating to them are provided abroad. …

(3) The taxable value of other services shall be the difference between the amount paid by the customer for the service and the amount paid by the undertaking for travel-related inputs. …

(4) By way of exception to Paragraph 15(1), the undertaking may not deduct the amount of

input tax charged on invoices for travel-related inputs. The remaining provisions of Paragraph 15 shall apply in full. …'

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

10 ISt is a limited-liability company established under German law. It offers to its customers programmes called, inter alia, 'High School' and 'College'.

11 The 'High School' programme is aimed at schoolchildren aged between 15 and 18 who wish to attend a high school or similar institution abroad, in particular in English-speaking countries. Candidates for those programmes submit an application to iSt which, following an interview, decides whether or not to admit them. ISt undertakes to find those who are admitted a place at the selected high school.

12 The order for reference states that where the 'High School' programme takes place in the United States, the student is provided with accommodation for the duration of the visit with a host family which is chosen in cooperation with one of iSt's local partner organisations. A representative of the partner organisation is available to the student for discussion at the school and in the home of the host family. The same organisation offers the student the opportunity to tour the host country by coach or plane in the company of other exchange students.

13 The package offered by iSt in those circumstances includes the return flight to the United States from Frankfurt-am-Main with a guide, flight connections within Germany, return flight connections within the United States to and from the destination, board and lodging with the host family, classes at the selected high school, support from the partner organisation and its local representatives during the visit, preparatory meetings, preparatory materials and travel cancellation insurance.

14 As for the 'College' programme, which is for students and school-leavers, it is the responsibility of the partner organisation to pay the tuition fees to the selected college out of funds received from iSt for its services and to ensure that the participants are enrolled in that college for a period of from one to three terms. The participants book their flights themselves and do not receive board and lodging in host families, but in the selected college.

15 Having at first classified the services provided by iSt as 'travel services' within the meaning of Paragraph 25 of the UStG 1993, the Finanzamt subsequently took the view that in fact they were educational or training services which should be exempt under Paragraph 4(23) of that law. As a consequence of classifying the services in question as exempt services, for which no deduction of the VAT charged was possible, the Finanzamt reduced the VAT excesses declared by that company for the years 1995 to 1997.

16 ISt brought an action against that decision before the appropriate Finanzgericht, seeking an increase in the amount of tax on inputs for the three years in question. By its decision, the Finanzgericht upheld iSt's application, finding that the services supplied are travel services within the meaning of Paragraph 25 of the UStG 1993 and that Paragraph 4(23) of that law did not apply.

17 The Finanzamt appealed on a point of law to the Bundesfinanzhof, which decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does the special scheme for travel agents set out in Article 26 of Directive 77/388/EEC also apply to transactions entered into by an undertaking which organises "High School" and "College" Programmes involving periods of three to 10 months spent in a foreign country, which are offered to participants by the undertaking in its own name and which are provided using services

performed by other taxable persons?'

The question referred for a preliminary ruling

18 By its question, the referring court asks essentially whether the conditions for the application of Article 26(1) of the Sixth Directive are met in the case of a trader which, in consideration of the payment of a fixed sum, offers its customers programmes entitled 'High School' and 'College' which include, inter alia, a period of between three and 10 months' language study abroad.

19 To answer that question, it is necessary to ask whether a company such as iSt acts in its own name and whether it qualifies as a trader covered by the special scheme for travel agents and uses for its operations supplies and services provided by other taxable persons.

20 First, according to the case-law, it is for the national court before which a dispute concerning the application of Article 26 of the Sixth Directive is brought to inquire, having regard to all the details of the case, and in particular the nature of the contractual obligations of the trader concerned towards its customers, whether or not that condition is met (see, to that effect, Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraph 21). Furthermore, as the order for reference makes clear, it is not in dispute that the applicant in the main proceedings does not act as agent for the operations to which that decision primarily applies.

21 Second, as regards the status of a trader covered by Article 26 of the Sixth Directive, it should be noted that, according to the case-law, the services provided by travel agents and tour operators most frequently consist of multiple services, in particular transport and accommodation, supplied either within or outside the territory of the Member State in which the undertaking has established its business or has a fixed establishment. The application of the normal rules on place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations. 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 (see *Van Ginkel*, paragraphs 13 to 15; Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 18, and Case C-149/01 *First Choice Holidays* [2003] ECR I-6289, paragraphs 23 and 24).

22 The Court has held in that regard that the underlying reasons for the special scheme for travel agents and tour operators are equally valid where the trader is not a travel agent or tour operator within the normal meaning of those terms, but effects identical transactions in the context of another activity, such as that of hotelier. To interpret Article 26 of the Sixth Directive as applying solely to traders who are travel agents or tour operators within the normal meaning of those terms would mean that identical services would come under different provisions depending on the formal classification of the trader (*Madgett and Baldwin*, paragraphs 20 and 21).

23 In the case in the main proceedings, it is not in dispute that iSt is not a travel agent or tour operator within the normal meaning of those terms. It is however necessary to decide whether it provides services identical to those of a travel agent or tour operator.

24 It must be found that, in the course of its activities in relation to the 'High School' and 'College' programmes, iSt provides services which are identical or at least comparable to those of a travel agent or tour operator, in that it offers services involving the travel by plane of its customers and/or their stay in the host State and, in order to provide services generally associated with that type of activity, it uses the services of other taxable persons within the meaning of Article 26 of the Sixth Directive, namely a local partner organisation and airlines.

25 In those circumstances, it is necessary to determine whether, in respect of the transactions carried out by iSt and for which it uses supplies and services of other taxable persons, it should be subject to VAT pursuant to Article 26.

26 It is not ruled out in that respect that traders supplying services usually associated with travel might be required to use travel supplies acquired from third parties which, compared with the other supplies of those traders, represent a small proportion of the total package. Those bought-in services do not therefore constitute for customers an aim in itself, but a means of better enjoying the principal service supplied by the trader (see, to that effect, *Madgett and Baldwin*, paragraph 24).

27 It should be noted that in such circumstances the services bought in from third parties remain purely ancillary in relation to the in-house services, and the trader should not be taxed under Article 26 of the Sixth Directive (*Madgett and Baldwin*, paragraph 25).

28 However, it should be noted in that regard that where a trader such as iSt habitually offers its customers travel services, in addition to services associated with the language training and education of its customers, which cannot be carried out without a substantial effect on the package price charged, such as travel to the host State and and/or the stay in that State, such services are not to be equated with purely ancillary services. As is clear from the order for reference, the services in question do not represent a marginal share in relation to the corresponding services associated with the language training and education which iSt offers its customers.

29 In those circumstances, Article 26 of the Sixth Directive must be interpreted as meaning that it applies to a trader such as iSt which habitually offers to its customers, in addition to services associated with the language training and education of those customers, services bought in from other taxable persons such as travel to the host State and/or the stay in that State.

30 However, that application is disputed by some Member States which have submitted observations to the Court, on the ground that the transactions carried out by iSt do not in any way fall within the services covered by that article.

31 First, the application of Article 26 of the Sixth Directive is disputed by the German Government on the ground that, according to the Court's case-law, travel consisting of student exchanges of six months' or one year's duration, the purpose of which is attendance by students at an educational establishment in a host country in order to familiarise themselves with the people and culture of that country, and during which the students are accommodated free of charge with a local family as a family member is not travel within the meaning of Directive 90/314 (Case C-237/97 *AFS Intercultural Programs Finland* [1999] ECR I-825, paragraph 34). On that point, the Cypriot Government adds that, in the light of the nature of the service provided by iSt as a whole, the principal service offered is the opportunity to follow a course of language training and that that service cannot be considered to be one of the usual services provided by a travel agent within the meaning of Article 26 of the Sixth Directive.

32 By their arguments, the German and Cypriot Governments essentially submit that the language visit offered by iSt under its 'High School' and 'College' programmes does not fall within the definition of 'travel' for the purposes of Article 26 of the Sixth Directive.

33 In that regard, in addition to the fact that the Court's assessment in *AFS Intercultural Programs Finland* did not concern the application of the Sixth Directive, it should be noted that the points made in that judgment have no bearing on the application of Article 26 of that directive.

34 It is true that that article does not include a definition of the concept of travel. However, in applying that article there is no need to set out in advance the factors constituting travel. That provision applies provided that the trader in question is a trader for the purposes of the special scheme for travel agents, acts in its own name and uses in its operations supplies and services provided by other taxable persons. More particularly, in respect of operations for which the trader should be taxed under Article 26 of the Sixth Directive, the only relevant criterion for the application of that article is whether or not the travel service is ancillary.

35 Furthermore, if the observations submitted in that respect, in particular by the German Government, were followed, Article 26 of the Sixth Directive would apply on the basis of the objective of the travel offered and the duration of the stay in the host State. Such an interpretation would have the effect of adding an additional condition to any application of that article.

36 There is no reason to suggest that the Community legislature intended to restrict the scope of Article 26 of the Sixth Directive on the basis of two combined or distinct factors, namely the objective of the travel and the duration of the stay in the host State. Any other finding in that respect would be likely to seriously restrict the scope of that article and would be incompatible with the special scheme it introduces.

37 Furthermore, it is clear that imposing such an additional condition for the implementation of Article 26 of the Sixth Directive might amount to drawing a distinction between traders on the basis of the purpose of the stay which they offer in the host State and would unquestionably distort competition between the traders concerned and compromise the uniform application of that directive.

38 Second, the German Government considers that Article 26 of the Sixth Directive cannot apply to the dispute in the main proceedings in so far as the services offered by iSt concerning the language training and education of its customers essentially fall within the services exempted under Paragraph 4(23) of the UStG 1993. The German Government submits that, if the service offered falls ratione materiae within the cases exempted under that directive and, in particular, Article 13A(1)(i) thereof, the special tax scheme laid down in Article 26 does not apply.

39 There is nothing to suggest that the application of Article 26 is dependent on such a condition. It should be noted that in respect of operations involving bought-in supplies and services for which traders should be taxed under that article, the only relevant criterion is whether or not the travel service is ancillary.

40 Furthermore, it should be noted that the scheme laid down by Article 26 of the Sixth Directive, which seeks to adapt the relevant rules on VAT to travel agents and traders supplying identical or comparable services, is a special tax scheme and not a special exemption scheme applicable to certain activities carried out by those traders.

41 In those circumstances, the argument put forward in the present case by the German Government is irrelevant and, therefore, cannot justify a failure to apply Article 26 of the Sixth Directive in the case in the main proceedings.

42 That finding does not imply, however, that no inference can be drawn from the scheme of exemptions laid down by Title X of the Sixth Directive where the question arises as to whether or not Article 26 applies.

43 It should be noted in that regard that Article 26(3) provides that 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) of the Sixth Directive. It follows that the Community legislature did not rule out the possibility of applying those provisions of the VAT exemption scheme provided for by that directive in the course of transactions performed under Article 26 of that directive.

44 However, it cannot be argued on the basis of Article 26(3) that the special scheme for travel agents laid down by the Sixth Directive is not applicable in the present case on the ground that transactions performed by iSt are exempt by reason of their purpose or nature. According to Article 26(3) the relevant criterion according to which a transaction may be exempt from VAT under that provision does not take account, as the German Government submits, of the purpose or nature of the transaction as performed, but of the place of performance of the service supplied.

45 In any event, even if the transactions carried out by iSt concerning the language training and education of its customers fall within the transactions exempt under Article 13A(1)(i) of the Sixth Directive, that article cannot apply in so far as it is clear from the order for reference that iSt is a commercial company and not a body governed by public law or other similar organisation to which that article refers. The application of the provisions of that article to a company such as iSt implies a broad interpretation of the system of exemption laid down by that directive.

46 It should be noted that, according to settled case-law, the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly (see, inter alia, Case C-472/03 *ArthurAndersen* [2005] ECR I-1719, paragraph 24 and the case-law cited).

47 It follows that the argument put forward in the present case by the German Government must, in any event, be rejected.

48 It follows from all of the foregoing considerations that the reply to the question referred for a preliminary ruling should be that Article 26 of the Sixth Directive should be interpreted as meaning that it applies to a trader who offers services such as the 'High School' and 'College' programmes involving the organisation of language and study trips abroad and which, in consideration of the payment of an all-inclusive sum, provides in its own name to its customers a stay abroad of three to 10 months and buys in services from other taxable persons for that purpose.

Costs

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

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

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, should be interpreted as meaning that it applies to a trader who offers services such as the 'High School' and 'College' programmes involving the organisation of language and study trips abroad and which, in consideration of the payment of an all-inclusive sum, provides in its own name to its customers a stay abroad of three to 10 months and buys in services from other taxable persons for that purpose.

[Signatures]

* Language of the case: German.