JUDGMENT OF THE COURT (Third Chamber)

26 September 2013 (*)

(Failure of a Member State to fulfil obligations – Taxation – VAT – Directive 2006/112/EC – Articles 306 to 310 – Special scheme for travel agents – Discrepancies between language versions – National legislation providing for the application of the special scheme to persons other than travellers – Concepts of ‘traveller’ and ‘customer’ – Exclusion from the special scheme of certain sales to the public – Mention in the invoice of an amount of deductible VAT not related to the input tax due or paid – Overall determination of the taxable amount for a given period – Not compatible)

In Case C?189/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 20 April 2011,

European Commission, represented by L. Lozano Palacios and C. Soulay, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Centeno Huerta, acting as Agent, with an address for service in Luxembourg,

defendant,

supported by:

Czech Republic, represented by M. Smolek, T. Müller and J. O?ková, acting as Agents,

French Republic, represented by G. de Bergues and J.?S. Pilczer, acting as Agents,

Republic of Poland, represented by A. Krai?ska, A. Kramarczyk, M. Szpunar and B. Majczyna, acting as Agents,

Portuguese Republic, represented by L. Inez Fernandes and R. Laires, acting as Agents,

Republic of Finland, represented by J. Heliskoski and M. Pere, acting as Agents,

interveners,

THE COURT (Third Chamber),

composed of M. Ileši?, President of the Chamber, E. Jaraši?nas, A. Ó Caoimh, C. Toader and C.G. Fernlund (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 March 2013,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2013,

gives the following

Judgment

1 By its action, the European Commission requests the Court to declare that:

– by authorising travel agents to apply the special scheme for travel agents to travel services sold to persons other than travellers;

– by excluding from the special scheme sales to the public, by retail agents acting in their own name, of travel services organised by wholesale agents;

– by authorising travel agents, in certain circumstances, to charge in the invoice an overall amount of value added tax (VAT) that is not related to the tax actually charged to the customer, and by authorising the customer, where he is a taxable person, to deduct that overall amount from the VAT payable; and

– by authorising travel agents, in so far as they benefit from the special scheme, to make an overall determination of the taxable amount for each tax period,

the Kingdom of Spain has failed to fulfil its obligations under Articles 306 to 310, 226, 168, 169 and 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (‘the VAT Directive’).

Legal context

European Union law

The special scheme for travel agents

2 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’), in the Spanish language version (DO L 145, p. 1; EE 09/01, p. 54), provided:

‘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 [“viajero”] 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 [“viajero”]. 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 [“viajero”], exclusive of [VAT], 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 [“viajero”].

…

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 [“viajero”], shall not be eligible for deduction or refund in any Member State.’

3 In Chapter 3 of Title XII of the VAT Directive, ‘Special scheme for travel agents’, Articles 306 to 310, in the Spanish language version, provide:

‘*Article 306*

1. Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers [“viajero”] in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.

2. For the purposes of this Chapter, tour operators shall be regarded as travel agents.

Article 307

Transactions made, in accordance with the conditions laid down in Article 306, by the travel agent in respect of a journey shall be regarded as a single service supplied by the travel agent to the traveller [“viajero”].

The single service 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 carried out the supply of services.

Article 308

The taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent's margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller [“viajero”] and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller [“viajero”].

Article 309

If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the supply of services carried out by the travel agent shall be

treated as an intermediary activity exempted pursuant to Article 153.

If the 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.

Article 310

VAT charged to the travel agent by other taxable persons in respect of transactions which are referred to in Article 307 and which are for the direct benefit of the traveller [“viajero”] shall not be deductible or refundable in any Member State.’

Other provisions of the VAT directive

4 Article 73 of the VAT Directive provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

5 Article 78 of the VAT Directive provides:

‘The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

…’

6 Articles 168 and 169 of the VAT Directive relate to the right of deduction. Article 168 provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…’

7 Article 169 of the VAT Directive provides that, in addition to the deduction referred to in Article 168, the taxable person is to be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the transactions mentioned in Article 169.

8 Article 226 of the VAT Directive, concerning the content of invoices, provides:

‘Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(9) the VAT rate applied;

(10) the VAT amount payable, except where a special arrangement is applied under which, in accordance with this Directive, such a detail is excluded;

…’

9 In Chapter 4 of Title XII of the VAT Directive, entitled ‘Special arrangements for second-hand goods, works of art, collectors’ items and antiques’, Article 318 of the directive provides:

‘1. In order to simplify the procedure for collecting the tax and after consulting the VAT Committee, Member States may provide that, for certain transactions or for certain categories of taxable dealers, the taxable amount in respect of supplies of goods subject to the margin scheme is to be determined for each tax period during which the taxable dealer must submit the VAT return referred to in Article 250.

…’

Spanish law

10 Article 141(1) and (2) of Law No 37/1992 of 28 December 1992 on value added tax (BOE No 312, 29 December 1992, p. 44247) provides:

‘1. The special scheme for travel agents shall apply to:

1. Transactions carried out by travel agents when they deal with travellers in their own name and use goods or services supplied by other businesses or professional persons in the provision of travel.

For the purposes of this special scheme, accommodation or transport services, whether provided singly or as a package, together with any complementary or ancillary services, shall be considered to be travel.

2. Transactions carried out by tour operators in the circumstances set out in the previous subparagraph.

2. The special scheme for travel agents shall not apply to the following transactions:

1. Sales to the public by retail agents of travel organised by wholesale agents.’

11 Article 142 of Law No 37/1992 states:

‘In transactions to which this special scheme applies, taxable persons shall not be required to indicate separately on their invoices amounts passed on which, where they are present, are to be deemed to be included in the price of the transaction.

In transactions carried out for other businesses or professional persons, comprising only supplies of goods or services falling entirely within the territorial scope of the tax, the invoice may indicate, at the request of the person concerned and under the heading “amounts of VAT included in the price”, a figure obtained by multiplying the total price of the transaction by six and dividing the result by 100. Such amounts shall be regarded as being directly passed on to and borne by the business or professional person who is the recipient of the supply.’

12 Article 146 of Law No 37/1992 provides:

‘1. Taxable persons may choose to determine their taxable amount on a transaction by

transaction basis or globally for each tax period.

The choice shall be effective for all transactions to which the special scheme applies carried out by the taxable person for a period of at least five years and, in the absence of any intervening declaration to the contrary, for subsequent years.

2. Global determination for each tax period of the taxable amount in respect of transactions to which the special scheme applies shall be effected as follows:

(1) The actual overall cost, including tax, of supplies of goods or services made by other businesses or professional persons to the agency during the relevant tax period, which are used in the provision of travel for the benefit of the traveller, shall be subtracted from the overall price, including VAT, charged to customers in respect of transactions for which the chargeable event occurred during the same period.

(2) The global taxable amount shall be determined by multiplying the result by 100 and dividing the product by 100 plus the standard rate of tax laid down in Article 90 of this Law.

3. The taxable amount shall never be negative.

However, where the taxable amount is determined globally, any sum by which the amount to be subtracted exceeds the amount from which it is to be subtracted may be added to the amounts to be subtracted during the tax periods immediately following.'

The pre-litigation procedure and the proceedings before the Court

13 On 23 March 2007 the Commission sent a letter of formal notice to the Kingdom of Spain, drawing its attention to the possible incompatibility of the Spanish legislation relating to the special scheme for travel agents with Articles 306 to 310 of the VAT Directive, on account of the application of that scheme to services supplied to persons other than travellers, and the Kingdom of Spain replied by letter of 29 May 2007.

14 On 1 February 2008 the Commission sent an additional letter of formal notice to the Kingdom of Spain, in which it called into question, first, the provisions of Article 141(2)(1) of Law 37/1992, which provide for the exclusion from the special scheme of sales to the public by retail agents of travel services organised by wholesale agents, secondly, the specific rule concerning invoicing and deduction in Article 142 of that law and, thirdly, the special provisions in Article 146 of that law relating to the overall calculation of the taxable amount for each tax period.

15 The Kingdom of Spain replied to that letter of formal notice by letter of 19 May 2008.

16 As it was not satisfied with the answers provided by the Kingdom of Spain to its letters of formal notice, the Commission issued a reasoned opinion on 9 October 2009, to which the Kingdom of Spain failed to answer.

17 In those circumstances the Commission decided to bring the present action.

18 By order of the President of the Court of 14 September 2011, the Czech Republic, the French Republic, the Republic of Poland, the Portuguese Republic and the Republic of Finland were granted leave to intervene in support of the form of order sought by the Kingdom of Spain.

The action

First head of claim

Arguments of the parties

19 The Commission considers that the special scheme for travel agents, provided for in Articles 306 to 310 of the VAT Directive, is applicable solely to sales of travel services to travellers ('the traveller-based approach'). It complains that the Kingdom of Spain authorised the application of that scheme to sales of travel services to any type of customer ('the customer-based approach').

20 The Commission notes that the provisions of Articles 306 to 310 reproduce, in essence, those of Article 26(1) to (4) of the Sixth Directive.

21 It claims that the intention of the European Union legislature, when adopting the Sixth Directive, was to restrict the special scheme for travel agents to services provided to travellers, the final consumers. In support of that assertion, it claims that five of the six original language versions of the directive systematically used the term 'traveller' in Article 26 of the directive in a perfectly clear and coherent way. It follows that that term did not require any interpretation going beyond its literal meaning, so that the interpretation of Article 26 was unequivocal.

22 The use of the term 'customer' in the English language version of the Sixth Directive was a mistake, which was, moreover, made only once, in Article 26(1). Since the later translations of the Sixth Directive were based on that English language version, the term was frequently reproduced in those translations, as well as in numerous language versions of Articles 306 to 310 of the VAT Directive.

23 At the hearing before the Court, the Commission stated that the French language version of the Sixth Directive, which used only the term 'voyageur' ('traveller'), was the text on which all the Member States concerned had worked and about which they had come to agreement.

24 The Commission submits that the provisions relating to the special scheme for travel agents must be uniformly interpreted. The coexistence of the traveller-based approach and the customer-based approach leads to double taxation and distortions of competition.

25 The Commission explains, referring to Article 26 of the Sixth Directive, why, even though the term 'customer' appears in certain language versions of Articles 306 to 310 of the VAT Directive, it must nevertheless be understood to mean 'traveller'.

26 First of all, the Commission considers that if the customer-based approach were upheld, the condition in Article 26(1) of the Sixth Directive that agents act 'in their own name' would be redundant, since an operator always acts in his own name towards his customer. It follows, according to the Commission, that those terms should not be interpreted literally and that the word 'customer' must be understood in the same way as in the five other original language versions of the directive, that is to say, as meaning 'traveller'. The Commission claims, in that regard, that a travel agent can act towards a 'traveller' both in his own name and in the name, and on behalf, of a third party.

27 Next, if the European Union legislature had intended the term 'customer' to be understood not as 'traveller' but as any type of 'customer', there would have been illogical consequences, since the special scheme for travel agents would apply even where an agent acts as intermediary, in particular, where he seeks customers on behalf of a hotelier, in accordance with an agency contract concluded with the hotelier.

28 The Commission considers that that illogical nature is all the more obvious given that the

word ‘traveller’ is used in the English language version of the first sentence of Article 26(2) of the Sixth Directive, according to which ‘[a]ll 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’. According to the Commission, that sentence would be meaningless if the special scheme for travel agents applied without account being taken of the status of the recipient of the services. If that were the case, the legislature, according to the Commission, should have systematically used the term ‘customer’.

29 The Commission adds that the original six language versions of the third sentence of Article 26(2) of the Sixth Directive use the term ‘traveller’. It would, therefore, be inconsistent to refer to the ‘total amount to be paid by the traveller’ if the special scheme for travel agents could apply irrespective of the status of the travel agent’s customer. Where a travel agent carries out a sale to another travel agent, it would then be necessary, according to the Commission, to calculate the margin referred to in the third sentence of Article 26(2) by taking into account the difference between the amount to be paid by the traveller and the cost to the first agent, which would be irrelevant where there is no connection between the first agent and the traveller.

30 Finally, the Commission puts forward two other arguments. It states, first, that Article 26 of the Sixth Directive remained in force for almost 30 years, until it was repealed, and that the language versions of that article subsequent to the original six versions adopt, for the most part, the wording of the five identical original versions, by using solely the term ‘traveller’. Only five later language versions of that article made use of the English language version. Secondly, the Commission notes that exceptions to the general VAT scheme must be interpreted strictly.

31 In those circumstances, although the customer-based approach would be better able to achieve the objectives pursued by the special scheme for travel agents, that does not mean that that approach is correct. The Commission acknowledges that the special scheme could be improved, but it notes that the Member States may not adopt such an approach on their own initiative, by deviating from the express provisions of the Sixth Directive. In that regard, the Commission refers, in particular, to Case C?204/03 *Commission* v *Spain* [2005] ECR I?8389, paragraph 28. It adds that the special scheme was introduced to deal with the prevailing situation in 1977, at a time when travel services were mainly sold directly to travellers by travel agents. The sector concerned now has a greater number of operators, but it is not for the Member States but for the European Union legislature to remedy the inadequacies of the special scheme.

32 Following observations made by the intervening Member States, while firmly retaining the traveller-based approach, the Commission slightly altered its position by stating that the term ‘traveller’ covers not only natural persons but also legal persons who purchase a package for their own purposes and are consequently the end user of the travel service. That term therefore covers, according to the Commission, a company which purchases travel services for its employees. By contrast, the term ‘traveller’ is not applicable to natural or legal persons who resell the service to another person. The Commission notes that the special scheme for travel agents is not applicable to stages prior to the sale of such a service to the end user.

33 The Kingdom of Spain disputes the Commission’s interpretation of the special scheme for travel agents in Articles 306 to 310 of the VAT Directive.

34 It puts forward, on its own initiative or by expressing its agreement with the intervening Member States, the following arguments.

35 It submits that the literal interpretation adopted by the Commission cannot prevail, since, apart from the English language version of Article 306 of the VAT Directive, numerous other versions of that provision, namely those in Bulgarian, Polish, Portuguese, Romanian, Slovak,

Finnish and Swedish, do not use the term ‘traveller’ but the term ‘customer’.

36 An analysis of the terms used in the provisions surrounding Article 26(1) of the Sixth Directive or Article 306 of the VAT Directive is also incapable of providing guidance in order to determine the exact scope of those two provisions. An examination of the different language versions shows that the term ‘traveller’ is not used systematically either in Article 26(1) to (4) of the Sixth Directive or in Articles 306 to 310 of the VAT Directive. Some language versions systematically use the term ‘customer’, whereas others sometimes use ‘traveller’ and sometimes ‘customer’. Those divergences create uncertainty, as is shown by the fact that, inter alia, the Kingdom of Spain, the Czech Republic, the Hellenic Republic, the French Republic and the Italian Republic apply the customer-based approach, even though the language versions of the VAT Directive published in their official languages use the term ‘traveller’.

37 The Kingdom of Spain infers that it is necessary to have recourse to a teleological interpretation of the provisions concerned by examining the objectives pursued by the special scheme for travel agents. Those objectives are, moreover, not disputed by the Commission, and comprise the simplification of the rules relating to VAT applicable to travel agents and the distribution of VAT revenue among the Member States. It is also not in dispute that the customer-based approach is better adapted to achieving those objectives. Consequently, that approach is the only correct interpretation.

38 The Kingdom of Spain argues that the status of the recipient of the service, whether this is a traveller, a final consumer or an intermediary agent, is not relevant. It relies, by analogy, inter alia on Joined Cases C?308/96 and C?94/97 *Madgett and Baldwin* [1998] ECR I?6229, and claims that in that judgment, despite the derogating character of the special scheme at issue, the Court interpreted Article 26 of the Sixth Directive broadly by making the objective pursued by that scheme prevail over the wording of that article.

39 The customer-based approach, unlike the traveller-based approach, would allow the principle of neutrality of VAT to be respected, by treating in the same way operators who sell package travel services directly to travellers and those who sell such travel services to other operators.

40 As to the risk of double taxation referred to by the Commission, the Kingdom of Spain claims that it is due to the coexistence of the two approaches at issue and that it would be removed if a single approach were adopted.

41 As to the alleged inconsistencies pointed out by the Commission, concerning, in the first place, the terms ‘deal with customers in their own name’, the Kingdom of Spain disputes their existence. The Commission confuses the wording ‘deal with “customers”’, used in the English language version of Article 26 of the Sixth Directive, and the wording ‘deal with “their customers”’. Only the wording in the second case could be redundant.

42 Furthermore, the Commission itself used the expression ‘deal with customers in their own name’ in numerous language versions of its proposal of 8 February 2002 for a Council Directive amending Directive 77/388 as regards the special scheme for travel agents (COM(2002) 64 final).

43 The fear expressed by the Commission that that wording could lead to the special scheme for travel agents being applied to intermediaries is unfounded because of the express wording of the second paragraph of Article 306(1) of the VAT Directive, which rules out that possibility.

44 Concerning, in the second place, the wording ‘to be paid by the traveller’, the Court has already accepted that it cannot be interpreted literally and that it also covers the consideration

payable by a third party.

45 The Commission's approach, moreover, raises a practical problem, in that, if the special scheme for travel agents applies only to sales to the traveller, the final consumer, it could be necessary to verify, on a case-by-case basis, whether the purchaser of a travel service is in reality the person who will benefit from that service and whether he will not resell it to another person.

46 Furthermore, the reference by the Commission to *Commission* v *Spain* is not relevant, since the provisions at issue in that case, unlike those at issue in the present action, were unequivocal.

Findings of the Court

47 For the purposes of assessing the first head of claim, it must be determined whether, by authorising travel agents to apply the special scheme at issue to transactions which they carry out not only with 'travellers' but also with any type of 'customer', the Kingdom of Spain transposed Articles 306 to 310 of the VAT Directive correctly.

48 The Spanish language versions of Articles 306 to 310, first, and of Article 26(1) to (4) of the Sixth Directive, secondly, systematically use the term 'traveller'. By contrast, the other language versions of those two directives use the terms 'traveller' and/or 'customer', sometimes changing their use from one provision to another.

49 Despite those very substantial divergences, the Commission claims that a literal interpretation, based on five of the original six language versions of the Sixth Directive, which systematically use the term 'traveller', is possible, since the use of the term 'customer' in the English language version of that directive is a mistake.

50 The fact that only the English language version used the term 'customer', furthermore on only one occasion, might suggest that it was a mistake. The explanations provided by the Commission at the hearing, according to which the working document which was the basis of the Sixth Directive was drafted in French, could also support the idea that a mistake was made when that directive was translated into English.

51 However, several factors cast doubt on the Commission's analysis.

52 First of all, it must be noted that, if it was a mistake, it was not corrected in the English language version of the Sixth Directive.

53 Next, far from appearing only once and being confined to one language version in particular, the term 'customer' was used in numerous other language versions of the Sixth Directive and was not used only in Article 26(1).

54 Moreover, although that alleged mistake could have been corrected at least when the VAT Directive was adopted, that did not happen, since the term 'customer' appears also in numerous language versions of Articles 306 to 310 of that directive, not always systematically.

55 Finally, the proposal for a directive referred to in paragraph 42 above, which aimed to replace the existing legislation by a text adopting, in essence, the customer-based approach, used the term 'traveller' in the French language version of Article 26(1) of that directive, whereas it used the term 'customer' in the English language version of that same provision.

56 It follows that, contrary to what is claimed by the Commission, a purely literal interpretation of the special scheme for travel agents based on the text of one or more language versions, to the exclusion of the others, cannot prevail. In accordance with established case-law, it must be held

that the provisions of European Union law must be uniformly interpreted and applied in the light of the versions in all the languages of the European Union. Where there is divergence between the various language versions of a European Union text, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part (Case C?280/04 *Jyske Finans* [2005] ECR I?10683, paragraph 31).

57 In the present case, the other provisions which surround those using the term ‘customer’, as it is used in the English language version of the Sixth Directive, vary according to the language versions of the two directives in question, so that it is impossible to reach a conclusion concerning the interpretation of the special scheme for travel agents on the basis of the scheme of those provisions.

58 As regards the purpose of the special scheme, the Court has already pointed out on numerous occasions that the services provided by travel agents and tour operators in general consist of multiple services, in particular transport and accommodation, supplied both inside and 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. It was in order to adapt the applicable rules to the specific nature of that activity that the European Union legislature set up a special VAT scheme in Article 26(2) to (4) of the Sixth Directive (see Case C?163/91 *Van Ginkel* [1992] ECR I?5723, paragraphs 13 to 15; *Madgett and Baldwin*, paragraph 18; Case C?149/01 *First Choice Holidays* [2003] ECR I?6289, paragraphs 23 to 25; Case C?200/04 *ISt* [2005] ECR I?8691, paragraph 21; and Case C?31/10 *Minerva Kulturreisen* [2010] ECR I?12889, paragraphs 17 and 18).

59 The objective of the special scheme is, consequently, to simplify the rules relating to VAT applicable to travel agents. It also seeks a fair distribution of the revenue from the charging of that tax among the Member States, by ensuring, first, the attribution of the VAT revenue relating to each individual service to the Member State in which the final consumption of the service took place and, secondly, the attribution of that relating to the travel agent’s margin to the Member State in which the agent is established.

60 It should be pointed out, as is moreover not disputed, that the customer-based approach is the most conducive to achieving those two objectives by permitting travel agents to benefit from simplified rules regardless of the type of customer to whom they provide their services and by encouraging, in that way, a fair distribution of revenue between the Member States.

61 The fact that, when the special scheme for travel agents was adopted in 1977, the majority of those agents sold their services directly to the final consumer does not mean that the legislature intended to limit the special scheme to sales of that kind and to exclude sales to other operators.

62 Where an operator organises a package travel service and sells it to a travel agent who then resells it to a final consumer, it is that first operator who takes on the task of combining several services purchased from various third parties who are subject to VAT. In the light of the objective of the special scheme for travel agents, that operator must be able to benefit from simplified VAT rules and those rules must not be reserved to travel agents who limit themselves, in such a case, to reselling to the final consumer the package they have purchased from that operator.

63 Moreover, it should be recalled that the Court has already had occasion to interpret the term ‘traveller’ by giving it a wider meaning than that of final consumer. Thus, in paragraph 28 of *First Choice Holidays*, the Court held that the words ‘to be paid by the traveller’ in Article 26(2) of the Sixth Directive cannot be interpreted literally as excluding from the taxable amount for VAT

part of the ‘consideration’ obtained from a third party within the meaning of Article 11A(1)(a) of that directive.

64 The other objections raised by the Commission in order to rule out the customer-based approach cannot call that analysis into question.

65 The fact that the special scheme for travel agents is an exception to the normal rules, so that, as such, that exception must not be extended beyond what is necessary to achieve its objective (see *First Choice Holidays*, paragraph 22), does not, however, mean that the traveller-based approach must be adopted, if it compromises the effectiveness of that special scheme.

66 While acknowledging that the special scheme for travel agents is capable of improvement, the Commission, relying on paragraph 28 of *Commission* v *Spain*, submits that it is not for the Member States to adopt on their own initiative an approach which, according to those States, improves that scheme because, by doing so, they take the place of the European Union legislature. However, that judgment cannot properly be relied upon in the present case, since, unlike the special scheme for travel agents, the legislation at issue in that judgment was unequivocal.

67 The argument concerning the alleged inconsistencies which would result from a reading of the term ‘customer’ as meaning not ‘traveller’ but any type of ‘customer’ is valid only with respect to the original English language version of the Sixth Directive and the subsequent language versions, modelled on the latter, which use that term only on one occasion. Concerning the language versions of the VAT Directive which use that term systematically in Articles 306 to 310, that argument is ineffective.

68 With regard to the risk of travel agents applying the special scheme even where they are acting as intermediaries, it suffices to state that, in view of the express terms of the second subparagraph of Article 306(1) of the VAT Directive, which exclude such a possibility in any event, that risk is not established.

69 In the light of the above considerations, Articles 306 to 310 of the VAT Directive must be interpreted by following the customer-based approach.

70 It follows that the Commission’s first head of claim must be rejected as unfounded.

Second head of claim

Arguments of the parties

71 The Commission claims that, by excluding sales by retail agents of travel services organised by wholesale agents from the special scheme for travel agents, Article 141(2)(1) of Law 37/1992 is incompatible with Article 306 of the VAT Directive.

72 The Commission has doubts concerning the explanations provided by the Kingdom of Spain, according to which that exclusion applies only where the retail agent acts on behalf of a third party, that is to say, in general, on behalf of a wholesale agent.

73 According to the Commission, not only would that interpretation render Article 141(2)(1) meaningless, it would for the most part be *contra legem* and differ from the official interpretation provided by the Spanish authorities themselves and by legal writers. Furthermore, if that exclusion applied only where the agent acts on behalf of a third party, it is hardly conceivable that it would be limited to cases in which the travel service is organised by a wholesale agent.

74 The Commission claims that, in any event, Article 141(2)(1) is not a correct transposition of Article 306 of the VAT Directive and is a source of ambiguity.

75 The Kingdom of Spain contends that the alleged official interpretation referred to by the Commission is merely an opinion which has no binding force. It maintains that Article 141(2)(1) of Law 37/1992 restricts itself to stating that retail travel agents acting in the name and on behalf of wholesale agents may not apply the special scheme for travel agents to the sales they carry out. That statement is entirely compatible with the VAT Directive and the provision at issue is unambiguous.

76 In its rejoinder, the Kingdom of Spain notes that it is not for it to adduce evidence, since the Commission based the present complaint only on publications which are neither rules nor binding provisions in the Spanish legal system.

Findings of the Court

77 It is apparent from the actual wording of Article 141(2)(1) of Law 37/1992 that retail travel agents who sell to the public travel services organised by wholesale agents may not apply the special scheme for travel agents.

78 It must be stated that such an exclusion from the scope of the special scheme is not provided for by Article 306 of the VAT Directive.

79 The Kingdom of Spain does not dispute that such an exclusion is contrary to Article 306, but it asserts that Article 141(2)(1) must not be understood literally and that the exclusion it provides for applies only where the retail travel agent acts as intermediary for a wholesale agent.

80 That argument, however, cannot succeed, in the light of the terms, which are moreover express, of the provision at issue, the opinions issued by the authorities and legal writers' interpretations of that provision.

81 Although it is for the Commission, under Article 258 TFEU, to establish the existence of a failure to fulfil obligations, the Member States are none the less required, under Article 4(3) TEU, to facilitate the achievement of the Commission's task of ensuring that the treaties and secondary legislation are applied. It follows that where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is for that State to challenge in substance and in detail the information thus produced (see, to that effect, Case C?365/97 *Commission* v *Italy ('San Rocco')* [1999] ECR I?7773, paragraphs 84 to 86).

82 In the present case, the Kingdom of Spain has not submitted any recent decisions of its authorities or any case-law showing that Article 141(2)(1) of Law 37/1992 was applied otherwise than in accordance with its literal meaning.

83 It must, therefore, be held that Article 141(2)(1) is contrary to Article 306 of the VAT directive.

84 It follows that the second head of claim put forward by the Commission is well founded.

Third head of claim

Arguments of the parties

85 The Commission claims that it is apparent from the second paragraph of Article 142 of Law

37/1992 that, in the case of a travel service provided to another taxable person, consisting only of supplies carried out in Spanish territory, the travel agent may, after consulting the customer, mention in the invoice, as ‘VAT included in the price’, a defined percentage of the price including VAT, which is deemed to be payable by the customer and which he has a right to deduct. The Spanish tax authorities clearly acknowledged, in answer to numerous questions, that that amount is deductible where the customer is a taxable person benefiting from the right of deduction.

86 The Commission considers that that provision infringes Article 226 of the VAT Directive, relating to the details to be included in the invoice, and Articles 168 and 169 of that directive, by authorising the deduction of an amount which is not connected with the VAT paid by the recipient of the services supplied by the travel agent. Moreover, the provision is discriminatory, since it applies only to travel services exclusively provided in Spanish territory.

87 The Kingdom of Spain contends that the contested provision covers solely cases in which an undertaking purchases a tourist package from a travel agent for its employees. The provision is necessary because the Commission has failed to provide a solution to the problem posed by such a situation. The Kingdom of Spain notes that no deduction is possible where a traveller, understood as a ‘natural person’, purchases a travel service, or where travel agents provide services to each other.

88 The Kingdom of Spain disputes the alleged discriminatory nature of the provision at issue, maintaining that it complies with Article 309 of the VAT Directive, which provides for the exemption of the single service provided by the travel agent in respect of the part corresponding to supplies of goods and services made outside the territory of the European Union. The provision thus prevents tax from being deducted for the travel services purchased which benefit from that exemption.

Findings of the Court

89 Article 142 of Law 37/1992 permits a taxable person, in certain situations, to deduct an amount of VAT fixed at 6% of the total price, including VAT, mentioned on the invoice to him.

90 It must be stated, in the first place, that there is no provision for that deduction in the special scheme for travel agents.

91 In the second place, it should be recalled that Article 168 of the VAT Directive sets out the principle of the right to deduct VAT. That right concerns the input tax on the goods and services used by taxable persons for the needs of their taxed transactions (see *Commission* v *Spain*, paragraph 21). As the Advocate-General observes in point 26 of her Opinion, in order to ensure neutrality of VAT, the amount of the tax deducted must exactly correspond to the amount of the input tax due or paid.

92 Article 142 of Law 37/1992 relates not to the exact amount of VAT charged on the services received by the taxable person, but to an amount calculated on the basis of the total amount paid by him. That calculation in no way corresponds to the calculation of VAT provided for by the common system of VAT, which, in accordance with Article 78(a) of the VAT Directive, provides in particular that the taxable amount excludes the VAT itself.

93 It follows that that provision is not compatible with the method of calculating VAT or with the rules relating to the right of deduction provided for by the VAT Directive.

94 It also follows that the mention in the invoice of an amount corresponding to 6% of the total price invoiced is not consistent with the rules relating to the content of invoices set out in Article 226 of the VAT Directive.

95 Furthermore, the Commission noted correctly that, by permitting the possible deduction at issue only where the services are supplied in Spain, Article 142 of Law 37/1992 discriminates on the basis of nationality, which is also incompatible with the common system of VAT. The provisions of Article 309 of the VAT Directive, relied on by the Kingdom of Spain, cannot in any event serve as a basis for Article 142, since they do not provide for any distinction between Member States, but for an exemption for operations carried out outside the European Union.

96 The Commission's third head of claim must consequently be upheld.

Fourth head of claim

Arguments of the parties

97 The Commission claims that Article 146 of Law 37/1992, which permits travel agents to make an overall determination of the taxable amount for a given tax period, and thereby to calculate for that period a single profit margin for all the supplies of travel services covered by the special scheme for travel agents, has no legal basis in the VAT Directive.

98 It submits that neither Article 73 nor Article 318 of the VAT Directive is capable of constituting a basis for such a calculation. The way in which the Spanish authorities apply the special scheme for travel agents is liable, according to the Commission, to result in a reduction of the European Union's own resources, and the European Union is entitled to recover the corresponding amount, together with interest.

99 The Kingdom of Spain considers that the scope of Article 308 of the VAT Directive is sufficiently wide to allow for a system of overall calculation of the taxable amount for each tax period, such as that provided for by Spanish legislation.

100 It contends that Article 146 of Law 37/1992 aims to simplify the fulfilment of the tax obligations to which operators are subject, and does not impose obligations. The method of calculation provided for complies with the principle of neutrality and, consequently, does not result in any reduction of the European Union's own resources.

Findings of the Court

101 The special scheme for travel agents and, in particular, Article 308 of the VAT Directive, cited by the Kingdom of Spain, do not provide for any possibility of making an overall determination of the taxable amount of travel agents' profit margins.

102 Article 318 of the VAT Directive permits, in the context of special schemes expressly mentioned in Chapter 4 of Title XII of that directive, that is to say, those for second-hand goods, works of art, collectors' items and antiques, the taxable amount to be calculated on an overall basis, but that provision necessarily covers only certain sectors, not including that of travel agents.

103 Consequently, in that sector, the taxable amount must be calculated in accordance with Article 308 of the VAT Directive, by referring to each single service provided by the travel agent, not on an overall basis.

104 It follows that Article 146 of Law 37/1992 is not compatible with the special VAT scheme

provided for in Articles 306 to 310 of the VAT Directive.

105 Consequently, the Commission's fourth head of claim must be upheld.

106 In the light of all of the above, it must be held that:

– by excluding from the special scheme for travel agents sales to the public, by retail agents acting in their own name, of travel services organised by wholesale agents;

– by authorising travel agents, in certain circumstances, to charge in the invoice an overall amount of VAT that is not related to the VAT actually charged to the customer, and by authorising the customer, where he is a taxable person, to deduct that overall amount from the VAT payable; and

– by authorising travel agencies, in so far as they benefit from the special scheme, to make an overall determination of the taxable amount for each tax period,

the Kingdom of Spain has failed to fulfil its obligations under Articles 168, 226 and 306 to 310 of the VAT Directive.

Costs

107 Under Article 138(3) of the Rules of Procedure, the parties are to bear their own costs where each party succeeds on some and fails on other heads. However, if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs. As the Commission has failed on one of its four heads of claim, it must be ordered to bear one quarter of its own costs, and the Kingdom of Spain must be ordered to bear its own costs and three-quarters of the costs of the Commission.

108 In accordance with Article 140 of the Rules of Procedure, the Czech Republic, the French Republic, the Republic of Poland, the Portuguese Republic and the Republic of Finland are to bear their own costs.

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

1. **Declares that**

– **by excluding from the special scheme for travel agents sales to the public, by retail agents acting in their own name, of travel services organised by wholesale agents;**

– **by authorising travel agents, in certain circumstances, to charge in the invoice an overall amount of value added tax that is not related to the value added tax actually charged to the customer, and by authorising the customer, where he is a taxable person, to deduct this overall amount from the value added tax payable; and**

– **by authorising travel agencies, in so far as they benefit from the special scheme, to make an overall determination of the taxable amount for each tax period,**

the Kingdom of Spain has failed to fulfil its obligations under Articles 168, 226 and 306 to 310 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission to bear one quarter of its costs;**

4. **Orders the Kingdom of Spain to bear its own costs and to pay three-quarters of the costs of the European Commission;**

5. **Orders the Czech Republic, the French Republic, the Republic of Poland, the Portuguese Republic and the Republic of Finland to bear their own costs.**

[Signatures]

* Language of the case: Spanish.