OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 12 May 2005 (1)

Case C-291/03

MyTravel plc

v

Commissioners of Customs and Excise

(Reference for a preliminary ruling from the VAT and Duties Tribunal, Manchester (United Kingdom))

(VAT – Article 26 of the Sixth VAT Directive – Scheme applicable to travel agents and tour operators – In-house services and services purchased from third parties – Method of calculation of the taxable amount – Apportionment of package price between bought-in services and in-house services – Application of the market value method)

1. Article 26 of the Sixth VAT Directive 77/388/EEC (2) provided for a special value added tax ('VAT') scheme for travel agents and tour operators. That special scheme applies to such agents and operators who, in return for a single payment, sell holidaymakers a package comprising several services, including accommodation and transport, purchased from third parties. Under that scheme, the taxable amount for the purposes of VAT is not made up of the price of the trip net of tax but by the margin of profit made by the agency, that is to say the difference between the price paid by the purchaser net of tax and the cost of the services which the agency purchased from third parties.

2. In its judgment in *Madgett and Baldwin* (3) the Court held that where the package sold by a travel agency consists of services supplied partly by that agency and partly by other taxable persons, the VAT scheme under Article 26 applies solely to the services supplied by third parties.

3. It also ruled on the method to be used to identify the part of the all-in price relating to the services provided by the travel agency itself. More specifically, the question arose whether that method should take account of the actual cost of those services to the trader, as required by the legislation of the United Kingdom of Great Britain and Northern Ireland, or their market value. The Court ruled that a trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package.

4. Following that judgment, Airtours, which changed its name to MyTravel plc, (4) a tour operator also liable to VAT in the United Kingdom which had calculated its tax liability for 1995 to

1999 using the actual cost method, asked the national tax authorities for permission to recalculate it, in respect of certain years, using the market value method.

5. The VAT and Duties Tribunal, Manchester (United Kingdom), asks the Court to state whether and on what terms a tour operator such as MyTravel may recalculate its VAT liability using the market value method described in the judgment in *Madgett and Baldwin*, cited above.

I – **Legal background**

A – *Article 26 of the Sixth Directive*

6. 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 its registered office or a permanent establishment.

7. The application of the normal rules on place of taxation, taxable amount and deduction of input tax would, because of the number 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. Thus, in order to recover the input tax on services purchased from other undertakings for the purposes of organising the trip, such taxable persons would be required to complete the necessary administrative formalities in each Member State in which they purchased such services.

8. The purpose of Article 26 of the Sixth Directive is thus to simplify the Community rules on VAT for such traders (5) and, in particular, to provide a simplified method of deducting input tax, whichever the Member State in which it was collected. (6)

9. It thus introduces a special scheme for travel agents and tour operators, 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. (7)

10. Under that scheme, all transactions performed by the travel agent in respect of a journey are treated as a single service supplied by the travel agent to the traveller. It is 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. (8)

11. That special scheme also provides for a derogation from the general scheme set out in Article 11A(1)(a) of the Sixth Directive, according to which the taxable amount for VAT is made up of everything which constitutes the consideration obtained by the supplier from the purchaser. (9) Thus, the third sentence of Article 26(2) of that directive provides:

‘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.’

12. As a corollary of that reduction of the taxable amount to the amount of the profit margin, ‘[t]ax 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.’ (10)

B – *National law*

13. Article 26 of the Sixth Directive was implemented in the United Kingdom by Section 52 of the Value Added Tax Act 1994 and the Value Added Tax (Tour Operators) Order 1987.

14. The method for the calculation of the profit margin made by tour operators who supply services purchased from third parties is specified, for the tax years at issue in the main proceedings, by Notice No 709/5/88 and subsequently by Notice No 709/5/96 of the Commissioners of Customs and Excise, (11) known as the 'Tour Operators' Margin Scheme'. The referring court states that, for the purposes of the present proceedings, the methods laid down by those two notices can be considered identical. (12)

15. The TOMS Notice requires a tour operator whose packages include a mixture of bought-in and in-house supplies to apportion the total package price between the cost to him of the supplies in each category. The cost of the bought-in supplies is the amount charged to the tour operator by the third party supplier: the cost of providing in-house supplies is calculated from the tour operator's accounts. Having arrived at separate figures for buying-in costs and in-house costs, and thus at an overall margin between the aggregate costs and the package price, the tour operator must then apportion the total margin in the ratio of in-house costs: buying-in costs. The margin for services purchased is then taxed under the scheme in Article 26 of the Sixth Directive and the part of the package corresponding to in-house services is taxed according to the general rules laid down by that directive.

C – *The judgment in Madgett and Baldwin*

16. Mr Madgett and Mr Baldwin ran a hotel in Devon, England. 90% of the hotel's customers bought a 'package', that is to say that they paid a fixed price covering half-board accommodation, transport by coach from various pick-up points and a day excursion by coach. The other customers made their own travel arrangements to and from the hotel, did not have the sightseeing excursion and paid a different price. Mr Madgett and Mr Baldwin obtained the services for transporting their clients to the hotel and for the coach trips from third parties.

17. In that judgment, the Court ruled, first, that although the principal reason for the special margin scheme under Article 26 of the Sixth Directive is the existence of problems in connection with travel services which include elements in more than one Member State, the wording of that provision is such that it applies also to supplies of services within a single Member State. (13) Second, it held that its application should not be limited only to those traders formally classified as travel agents or tour operators but should be extended also to hoteliers such as Mr Madgett and Mr Baldwin who supply services associated with travel purchased from third parties, provided such services are not purely ancillary in relation to the services provided as hoteliers. (14)

18. The Court then went on to consider how to calculate the taxable margin where the package price consists of in-house services and bought-in services.

19. First, it inferred from the content of Article 26 of the Sixth Directive, from its objectives and from the fact that it derogates from the general scheme that the special scheme under that Article must apply only to services purchased from third parties. (15)

20. The implication of that analysis is that the travel agent must apportion the package price paid by its customers so as to identify the margin on services purchased from third parties. However, Article 26 of the Sixth Directive, because it does not contemplate the provision of packages comprising both bought-in and in-house services, does not define any criteria by which that margin may be calculated and the amount corresponding to in-house services deducted from the package price. Moreover, since that package price covers both services bought in from third parties and in-

house services, the consideration within the meaning of Article 11A(1)(a) of the Sixth Directive cannot be used as the taxable amount for the latter.

21. The referring court therefore sought the view of the Court on the unit of reference to be used in order to identify the part of the package which relates to the in-house services. It suggested two possible methods, one based on actual costs to the trader, as under TOMS, and the other based on market value. The second method consisted in taking as the unit of reference for determining the value of the accommodation provided by hoteliers as part of the package the price of rooms and half-board charged to customers who did not buy the package. Under that method, it was sufficient to deduct from the package price the total value of the accommodation based on the prices charged without the package to calculate the value of bought-in services, because that value of the accommodation covers both the profit margin and its cost. The deduction of the price of services bought in from third parties then yields the taxable margin required by Article 26 of the Sixth Directive.

22. Faced with those alternatives, the Court indicated that neither of the two proposed methods served to determine exactly the consideration actually received by the trader for the services he supplied himself. For instance, the actual cost method used by the United Kingdom Government could be problematic, as there is no reason to suppose that the margins on the different services which make up the package are proportional to the respective costs of those services. (16)

23. Similarly, use of the market value method – in the present case the room and half-board prices charged by the hotel where customers do not make use of the package – may also be to some extent arbitrary as the price of the accommodation offered as an in-house service as part of the package is not necessarily the same as the price for accommodation offered as a single service. (17)

24. However, the Court observed that the latter method had the advantage of simplicity compared with the actual cost method. It concluded its analysis with the following observations:

‘45 The actual cost method in relation to the in-house services requires a series of complex sub-apportionment exercises and thus also means substantial additional work for the trader. By contrast, use of the market value of the in-house services, as the Advocate General observes in point 76 of his Opinion, has the advantage of simplicity, since there is no need to distinguish the various elements of the value of the in-house services.

46 In those circumstances – bearing in mind that it is common ground in the present case that calculation of the VAT on the margin for the bought-in services by using one alternative or the other in principle gives the same figure for VAT – a trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package.

47 In the light of the foregoing, the answer to the questions referred by the VAT and Duties Tribunal must be that, on a proper construction of Article 26 of the Sixth Directive, where a trader subject to that article effects, in return for a package price, transactions consisting of services supplied partly by himself and partly by other taxable persons, the VAT scheme under that article applies solely to the services supplied by third parties. A trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package.’

II – **Facts of the dispute in the main proceedings**

25. MyTravel sells package holidays to be taken in foreign countries. The company invariably purchases the accommodation included in the packages from third parties. However, as it has its own airline, it generally uses its own aircraft to fly its customers to their destinations.

26. It also sells tickets to the public both for seats on its own aircraft and for seats on flights bought in from other airlines (referred to as 'seat-only' sales), as well as seats on planes to other tour operators (referred to as 'broked seats').

27. It declared its VAT liability for the 1995 to 1999 tax years using the TOMS method. Following the judgment in *Madgett and Baldwin* it recalculated its VAT liability for the years 1995, 1996 and 1997 by taking out of the calculations the 'market value' of seats sold as part of package holidays.

28. To obtain that market value, MyTravel used two methods. For 1995 and, it seems, for 1996, it began with the cost of seats sold as part of packages to which it added a 'percentage mark-up' equal to the mark-up it claims to have achieved on seat-only sales in the same period.

29. In 1995, MyTravel also sold packages including cruises, fly-drive and campsite accommodation. However, it has only sought to recalculate its liability on the flight components of its package, accepting that it has no appropriate comparator for the other in-house supplies for this purpose.

30. For 1997, MyTravel calculated, using an internal accounting document known as the 'Route Profitability Report', the 'average across-the-board revenue' obtained by it for seats sold to the public not as part of packages, arriving at a figure of GBP 153.

31. Having recalculated the costs of seats sold as part of packages, MyTravel applied to the Commissioners for the repayment of GBP 212 000 for 1995, of GBP 2 004 857 for 1996 and of GBP 711 051 for 1997.

32. The sums claimed are substantial inter alia because the effect of the method used by MyTravel is to increase the proportion of the package price which is attributed to transport which, under the applicable national law, is zero rated.

33. The Commissioners rejected those applications. As they argued before the referring court, *Madgett and Baldwin* indicates that a market value method cannot be used where, as in the case of MyTravel, it does not have the advantage of simplicity, it produces an artificial figure for the margin on bought-in supplies, and significantly changes the VAT liability. They argued, further, that that judgment did not provide ground for using a method selectively and that GBP 153 was not the market value of seats sold as part of packages.

34. MyTravel pointed out, conversely, that, in *Madgett and Baldwin*, the Court dismissed the argument that cost should be regarded as a more reliable indicator of the values of different elements in a package. It also argued that it could not be required that both methods should give rise to identical VAT liabilities, because that would oblige traders to do the calculations for both methods. As regards the ground of that judgment relating to the fact that the market value approach was simpler, that was just a factor taken into account in reaching the conclusion reached and not a condition to which the use of that method was subject.

35. According to MyTravel, it was entitled to use the method based on market value where it had an appropriate comparator, as in the case of seats on flights, and Article 26 of the Sixth VAT Directive did not preclude it from using both that method and the actual cost method at the same

time. As for the price of GBP 153, it reflects the average value of all seat-only flights and could serve as a basis for pricing journeys sold as part of packages, because, in *Madgett and Baldwin*, the Court did not require the trader to set the market value on the basis of identical services but on the basis of similar services.

III – **The questions referred for a preliminary ruling**

36. It is against that background that the VAT and Duties Tribunal, Manchester, decided to stay proceedings and refer the following questions on the interpretation of Article 26 of the Sixth Directive and the judgment in *Madgett and Baldwin* to the Court for a preliminary ruling:

‘1. In what, if any, circumstances is it open to a tour operator, which has completed its value added tax return for a financial year using the actual cost method which was the only method laid down in national legislation implementing the Directive, subsequently to recalculate its VAT liability partly in accordance with the market value method described in paragraph 46 of that judgment?

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

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

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

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

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

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

2 Is it possible in the circumstances of the present case to identify that part of the in-house service relating to flights sold as part of a holiday package by taking either (a) the average cost of an airline seat increased by the average margin achieved by the tour operator on seat only sales in the financial year in question or (b) the average revenue achieved by the tour operator on seat-only sales in the financial year in question?’

IV – **Analysis**

A – *The first question*

37. The first question covers several points. First, as appears inter alia from the use of the expression ‘if any’ in the first sentence of that question, the referring court seeks to know whether a tour operator who has filled in a VAT return for a given tax year using the method laid down by the national legislation implementing the Sixth Directive is entitled to recalculate his VAT liability in

the light of a judgment of the Court, in accordance with the method held by that judgment to be consistent with that directive.

38. I take the view that that question must be answered in the affirmative. It is settled case-law that the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. (18) It is only exceptionally that the Court may place a temporal restriction on its interpretation. (19) A preliminary ruling is thus intended to have effects on legal relationships arising before it was delivered, even where such relationships were not the subject of pending litigation. It follows, inter alia, that a rule of Community law as interpreted by the Court must be applied by an administrative authority exercising its powers even to legal relationships which arose and were established before the judgment ruling on the request for interpretation. (20)

39. It is likewise settled case-law that, where a Member State has levied charges on a taxpayer in breach of the rules of Community law, that taxpayer is entitled to their repayment. As it is generally phrased, that right to repayment is the consequence and complement of the rights conferred on individuals by the Community provisions as interpreted by the Court. (21)

40. It is also common ground that, while in the absence of Community rules on the recovery of charges it is for the domestic legal system of each Member State to lay down the conditions under which the right to repayment may be exercised, those conditions must observe the principles of equivalence and effectiveness, that is to say they must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the Community legal order. (22) According to that case-law, a taxable person who has paid VAT without its being due may claim, with retroactive effect from the date on which the national legislation contrary to the Sixth Directive came into force, a refund of VAT paid but not due, by following the procedural rules laid down by the domestic legal system, provided that those rules meet the requirements of equivalence and effectiveness. (23)

41. In my view, it can be inferred from all that case-law that a taxable person whose right to reimbursement by his administrative authorities or his national courts, under the conditions laid down by national law and subject to observance of the principles of equivalence and effectiveness, of VAT paid but not due has thus been acknowledged, must also be able, under the same conditions, to recalculate the amount of the tax he owes according to the method held by the Court to be consistent with Community law and to adjust his VAT returns accordingly.

42. I would therefore propose that the reply to that initial question should be that a travel agent or tour operator who has filled in his VAT return for a tax year using the method laid down by the national legislation transposing the Sixth Directive, is entitled to recalculate his VAT liability according to the method held by the Court to be consistent with Community law, under the conditions laid down by the applicable national law which must observe the principles of equivalence and effectiveness.

43. In its first question the referring court also seeks a ruling from the Court on the conditions under which a tour operator who, for a package price, supplies services provided by himself and services performed by third parties may use the method based on market value to identify the part of the package price corresponding to his own services.

44. Specifically, it seeks to know, essentially, whether Article 26 of the Sixth Directive must be interpreted as meaning that a travel agent or a tour operator who, for a package price, supplies bought-in services and in-house services must, as a rule, identify the part of the package price

corresponding to his own services using the method based on market value where that value can be determined, or whether the taxable person may choose freely whether to use that method or that based on actual cost. In that connection the referring court also seeks the view of the Court on the extent to which the use of the market value method must be simpler for the taxable person concerned and whether it is subject to the condition that it should result in VAT liability identical or similar to that which would have resulted from the use of the actual cost method.

45. It also seeks to know whether the market value method applies to in-house services whose value can be determined where, in the same tax year, the market value of certain in-house components of the package cannot be determined because the taxable person has not sold any similar services which were not part of a package.

46. The referring court states that it raises those questions because, in *Madgett and Baldwin* it can find nothing to indicate that the Court intended to restrict in any way the use of a market value method where it was possible for any taxable person 'to identify that part of the package on the basis of the market value of services similar to those which form part of the package'. Nor was it able to decide with certainty whether paragraphs 43 to 47 of that judgment contain the conditions that must be met if a taxable person is to be entitled to use a market value approach, as the Commissioners claim, or whether those paragraphs merely set out the factors that the Court took into account in reaching its decision in that case.

47. Those questions lead me to consider, first, whether the judgment in *Madgett and Baldwin* must be construed as meaning that a taxable person's option of apportioning the package price using the market value method is subject to the condition that use of that method should in practice be simpler in the particular circumstances of that taxable person and that it should result in a VAT liability equivalent to that resulting from the actual cost method.

48. Second, I will consider, if necessary, whether a taxable person is free to choose whether to use the market value method or not from one tax year to another. Finally, I will examine whether a taxable person may use that method for certain in-house services only where, in a given tax year, he is not in a position to ascertain the market value of the other in-house components of the package.

49. It must first be considered whether the apportionment, by a taxable person falling within Article 26 of the Sixth Directive, of the package price using the market value method is subject to the condition that use of that method should in practice be simpler in his particular circumstances and should result in a VAT liability similar to that resulting from use of the actual cost method. The question is whether, as the United Kingdom Government argues, a taxable person such as MyTravel is not entitled to adjust its VAT returns using the market value method on the grounds that it could have drawn them up without any particular difficulty using the actual cost method and that that adjustment resulted in a significant reduction in its VAT liability.

50. I do not accept the interpretation of the judgment in *Madgett and Baldwin* put forward by the United Kingdom Government.

51. In my view it is clear from paragraph 45 of that judgment that the reasons why the Court considered that the market value method had the advantage of simplicity did not relate to the particular circumstances of that case. The Court did not find that the method was simpler in the specific circumstances of Mr Madgett and Mr Baldwin but on comparison of the general conditions for applying the two competing methods, referring expressly to point 76 of my Opinion in that case. (24) It is, therefore, because the market value method inherently has the advantage of simplicity compared with the actual cost method that it should be preferred, according to that judgment. (25)

52. Moreover, as the referring court and the applicant in the main proceedings pointed out, making the use of that method of calculating the VAT payable by a travel agent or tour operator subject to the condition that, in the particular circumstances of each taxable person, it should in practice be simpler than the actual cost method would make the calculation of the taxable amount, which is an essential element of the VAT system, dependent on an uncertain and, to some extent, subjective analysis. Such a condition would run counter to the principle of legal certainty which requires, particularly in matters which, like VAT, have financial repercussions, that the Community rules should be certain and foreseeable. (26)

53. The fact that a taxable person like MyTravel was able to draw up its VAT returns under the TOMS system, using the actual cost method, without, it appears, encountering any particular difficulty should not, in my view, preclude it from drawing them up again using the market value method.

54. Nor do I think that the wording used in paragraph 46 of the judgment in *Madgett and Baldwin* – 'bearing in mind that it is common ground in the present case that calculation of the VAT on the margin for the bought-in services by using one alternative or the other in principle gives the same figure for VAT' – must be understood as constituting a condition to which the application of the market value method was subject. In my view, such an interpretation is not borne out by the wording of the grounds under consideration. The point is made between hyphens, after the words 'in those circumstances' which indicate that the conclusion reached by the Court in that paragraph 46 and the following paragraph follows from the points made in the previous paragraphs. The fact that in that case the two competing methods result in an identical tax liability thus appears to be beside the point.

55. Moreover, the effect of the interpretation put forward by the United Kingdom would be to oblige taxable persons, having drawn up their tax returns using the market value method, to carry out all the calculations necessary for the actual cost method. That approach would thus deprive the market value method of the advantage on the basis of which the Court held that it should be the method chosen, namely that the method is, generally, easier to use than the actual cost method. That approach might also make use of the market value method ineffective where, as here, the in-house services and the bought-in services are subject to different rates of VAT.

56. The use by a taxable person falling within Article 26 of the Sixth Directive, who, for a package price, supplies travellers with in-house services and bought-in services, of the market value method to apportion that package price is thus not, in my view, subject to the condition that it should result in a VAT liability equivalent to that which would result from the actual cost method. The fact, in the case in the main proceedings, that the use of that method resulted in a significant reduction in the tax liability of MyTravel thus should not, as such, constitute an obstacle to the use of that method.

57. Second, it must be considered whether the decision to use the market value method, where that value can be ascertained, must be within the discretion of the taxable person.

58. The purpose of that question is clear from the order for reference. The question is whether a taxable person like MyTravel, which has drawn up its VAT returns for the tax years 1995 to 1999 using the actual cost method, is entitled to recalculate its tax liability using the market value method only for the three years in which the effect of the use of that method was to significantly reduce its tax liability.

59. As the referring court points out, it is true that the wording of the reply to the questions by the Court in *Madgett and Baldwin* that 'a trader may not be required to calculate the part of the

package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package', (27) may appear a little ambiguous on that point. However, I do not think that, by that reply, the Court intended to say that a taxable person who can establish the market value of its own services is entitled to choose whether to use that method or the actual cost method solely in order to reduce its tax liability as much as possible.

60. Such an approach would, in my view, not be consistent with the basic principle underlying VAT. It should be borne in mind that the principle is that the tax constitutes a tax on consumption. It is exactly proportional to the price of goods and services and it is charged by taxable persons at every stage of the production or distribution process on behalf of the tax authorities to whom they are required to account for it and it is ultimately paid only by the final consumer. (28) The implementation of this system consequently requires that taxable persons be identified by the tax authorities of their country, that they keep accurate accounts and that they report periodically to those authorities. According to the basic principle of that system and the detailed rules for its operation, the VAT to be collected by the tax authorities must therefore be equal to the tax actually charged to the final consumer.

61. The conditions for the application of the particular scheme set up by Article 26 of the Sixth Directive for travel agents and tour operators, where a taxable person provides a holidaymaker, on payment of a package price, with both bought-in services and in-house services, should not call into question the basic principle of the VAT system. Accordingly, I support the position set out by the Commission of the European Communities, according to which the method of apportionment of the package price should, generally, be such as to result, for in-house services, in an outcome as close as possible to that which would result from the general VAT scheme as set out in Article 11A(1)(a) of that directive and in settled case-law, according to which the taxable amount should be the consideration actually received by the trader and not an amount estimated according to objective criteria. (29)

62. However, unlike the Commission, I am not convinced that the market value method is to be preferred to the actual cost method because, as that institution argues, it has the advantage, generally, that the proportions of the package price to be attributed respectively to bought-in services and in-house services can be established more precisely. It was not because of that advantage that the Court decided that that method was the appropriate method of apportionment in *Madgett and Baldwin*.

63. In that judgment, it pointed out that the method based on market value also has an element of arbitrariness, because it implies that the price of the in-house services supplied as part of the package is the same as their price where they are supplied on their own. In the main proceedings, that would amount to implying that the price of the flight sold by MyTravel as part of a package holiday is the same as the price of a flight to the same destination where it is sold separately by that taxable person. That assumption is not always justified. As I pointed out in my Opinion in *Madgett and Baldwin*, (30) it is not unusual for a package to be the occasion of offering a service at a lower price in order to make the offer of mixed services more attractive.

64. According to the judgment in *Madgett and Baldwin* the market value method is to be preferred, not because, as the Commission argues, it is generally conducive to an outcome which is as close as possible to that resulting from the application of the general VAT scheme, but because it is inherently simpler than the actual cost method.

65. However, in my view, that should not result in a right to use that method at a taxable person's own discretion, according to whether or not its effect is to reduce his tax liability compared with the liability which would result from the actual cost method. First, there is nothing in the judgment in *Madgett and Baldwin*

which would support the argument that the Court intended to grant traders such a discretion.

66. Second, the interpretation of that judgment proposed by MyTravel would allow taxable persons to alter at will the taxable amount covered by Article 26 of the Sixth Directive and that subject to the general scheme. Granting such a power to taxable persons might enable them to artificially increase the taxable amount subject to the lowest rate of tax and thereby create inequalities between traders in the conditions of competition, favouring those who have established the registered office of their business or a permanent establishment in a Member State which taxes certain transactions at a very low rate or at a zero rate, such as the United Kingdom in the case of passenger transport. (31) Such an interpretation might, accordingly, run counter to the principle of VAT neutrality in respect of competition.

67. In that connection, it is important to bear in mind that, as is clear from the ninth recital of the preamble to the Sixth Directive, the Community legislature intended the taxable base to be harmonised ‘so that the application of the Community rate to taxable transactions leads to comparable results in all the Member States’. The harmonisation of the taxable amount is thus intended to ensure that situations which are comparable in economic or commercial terms are subject to the same treatment as regards application of the VAT system. Such harmonisation thus helps to safeguard the neutrality of the system.

68. I, therefore, share the view of the Commission that the apportionment of the package price between bought-in services and in-house services should be made on the basis of the market value of the latter services where that value can be established.

69. All the same, it seems to me that it would be difficult to rule out altogether the option of derogating from that principle. As we have seen, the market value method also has an element of arbitrariness and one of the essential principles of VAT is its neutrality as regards taxable persons. It is common ground that, under the general VAT scheme, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer. (32) Accordingly, it seems to me that it is acceptable for a travel agent or tour operator who is able to prove that the actual cost method accurately reflects the actual structure of the package, to apportion his package prices using that method rather than the market value method.

70. That would be the case, for example, where a taxable person was able to prove, on the basis of his accounts, that, for the tax year at issue, he systematically set his package prices so as to allow a fixed profit margin on every item of expenditure borne by him. It seems to me that, in such a hypothetical case, the objective of harmonisation of the taxable base, which entails using the market value method as a general rule, should be subordinate to the requirement for neutrality.

71. I therefore take the view that a travel agent or tour operator who, for a package price, supplies travellers with bought-in services and in-house services must, generally, identify the part of the package price corresponding to the in-house services on the basis of their market value where that value can be established, unless he can prove that, for the tax year under consideration, the method based on actual costs accurately reflects the actual structure of the package price.

72. It is for the national tax authorities, and in appropriate cases, the national courts to assess whether it is possible to identify the part of the package price relating to in-house services on the basis of their market value.

73. In its judgment in *Madgett and Baldwin* the Court held that that market value should be determined on the basis of the price of similar services supplied by the taxable person himself and

not forming part of a package. (33) The Commission, for its part, takes the view that account could also be taken of similar services supplied by other taxable persons.

74. I am not in favour of the latter approach for the following reasons. First, it ties up with the proposal made by the Swedish Government in *Madgett and Baldwin* which, although it was not expressly rejected by the Court, was not incorporated in its judgment. Next, as I pointed out in my Opinion in that case, (34) it might give rise to more difficulties than advantages. The figure arrived at on the basis of like services supplied by other taxable persons is largely fictitious, since it has no direct relation to the service which is to be taxed. Moreover, there is a risk of imprecision, as the reference average may be disputed and thus become the subject of arguments among experts.

75. It seems to me that the facts of the main proceedings tend, rather, to confirm my analysis. The great fluctuation in the prices of flights and the diversity of cost, according to destination, as a result, in particular, of competition in that area from 'low cost' airlines might make it difficult and controversial to establish relevant comparators on the basis of transport provided by other taxable persons. Moreover, the referring court is not calling into question the method of establishing the market value of in-house services, which is set out in the judgment in *Madgett and Baldwin*. It is therefore for that court to assess whether flights sold individually by MyTravel may constitute similar services to those supplied by that taxable person as part of a package and, if appropriate, to establish the market value of those flights on the basis of the price of those sold individually.

76. The question also arises, in this case, of how to apportion the package price where the taxable person is not in a position to establish the market value of certain in-house services because it does not sell similar services without the package. That was the situation in the 1995 tax year, when MyTravel sold package holidays as part of which, in addition to flights, it supplied cruises and campsite accommodation itself, while it did not sell services of that type without the package. The referring court thus seeks to know, thirdly, whether, where the package includes in-house services whose market value cannot be established because the taxable person does not sell similar services without the package, that method none the less applies to in-house services whose market value can be ascertained.

77. The fact that a market value cannot be established for all the in-house services supplied by the taxable person cannot, in my view, justify a derogation from the application of that method to establish the value of services where that value can be ascertained. In such a case, it is true that the taxable person is obliged to apportion the package price using both methods of calculation. He must determine the market value of in-house services which he sells without the package in order to deduct their value from the package price, and then proceed to apportion the remainder of that price between bought-in services and other in-house services to establish the taxable margin under Article 26 of the Sixth Directive using the actual cost method.

78. However, I do not believe that this combination of the two methods entails insurmountable practical difficulties. The referring court did not mention any such difficulties and, according to the court-file, MyTravel was able to recalculate its VAT liability for 1995 by deducting only the market value of the flights. Moreover, I pointed out above the reasons why the application of the market value method should not, in my view, be subject to the condition that it should be easier to implement in the particular circumstances of each taxable person.

79. Moreover, although the purpose of Article 26 of the Sixth Directive is to adapt the rules applicable in respect of VAT to the specific nature of the work of a travel agent and thus reduce the practical difficulties which might hamper such work, the scheme established by that Article, unlike that set up for small undertakings and agricultural producers, (35) is not intended to simplify the accounting requirements entailed by the general VAT scheme. For instance, that Article provides, in subparagraph 3, that where transactions entrusted by the travel agent to other taxable

persons are performed by such persons both inside and outside the Community, only that part of the package price relating to transactions outside the Community may be exempted. I can see that the implementation of such a provision may also require travel agents to make fairly technical apportionments of their package prices. (36)

80. I cannot, therefore, see sufficient grounds, in that hypothetical case, not to apply the market value method and thereby compromise the objective pursued by the Sixth Directive of harmonisation of the taxable base. Accordingly, like the Commission, I take the view that a taxable person may, in a given tax year, apply the market value method to certain services and not to others where he is not in a position to establish the market value of those other services.

81. In the light of all those considerations, I would propose the following answer to the first question: Article 26 of the Sixth Directive must be interpreted as meaning that a travel agent or tour operator who, for a package price, supplies travellers with bought-in services and in-house services must, generally, identify the part of the package price corresponding to the in-house services on the basis of their market value, where that value can be established. In such a case, a taxable person may only use the actual cost method if he proves that that method accurately reflects the actual structure of the package price. Application of the market value method is not subject to the condition that it should be simpler than the method based on actual cost nor to the condition that it should result in a VAT liability identical or similar to that resulting from the method based on actual cost. Accordingly:

– a travel agent or tour operator may not use the market value method at its own discretion;

– the market value method is to be applied for in-house services whose value can be established, even if, in a given tax year, the value of certain in-house components of the package price cannot be established because the taxable person does not sell similar services without the package.

B – *The second question*

82. By the second question referred for a ruling the referring court seeks to know whether, in the circumstances of the main proceedings, it is possible to establish the share of the in-house services relating to the flights sold as part of packages by taking account of the average cost of a seat and adding the average margin made by the tour operator on sales of individual seats, during the financial year in question, in other words, the average income of the tour operator from sales of individual seats, in the same financial year.

83. By that question, the referring court is thus seeking clarification from the Court of Justice regarding the method of establishing in practice the market value of in-house services supplied by MyTravel as part of the package holidays it sells.

84. It must be borne in mind that, under Article 234 EC, the Court has no power to apply rules of Community law to a particular case, but only to rule on the interpretation of the Treaty and of acts adopted by Community institutions. (37) That question is, therefore, in my view, outside the jurisdiction which that Article confers on the Court, because it would require examination of the calculations done by MyTravel in its new VAT returns. Moreover, the referring court itself states that, in the event of the Court holding that that company is entitled to use a market value method, the precise method of calculating that market value would have to be determined at a re-hearing of that question by a tribunal of three persons, two of whom should be specialist members with accountancy qualifications and expertise.

85. None the less, as part of its interpretation of Article 26 of the Sixth Directive and in

amplification of the guidelines already given on the method of apportioning the package price where the taxable person supplies bought-in services and in-house services, the Court could, in my view, give an answer on the point raised in that question, as to whether it is possible to take average values as a basis for establishing market value.

86. Like the Commission, I take the view that there is nothing to preclude such a practice. On the contrary, an average value may be more representative where, as in this case, there is significant variation in the prices of similar services sold without packages. (38) The referring court could thus legitimately establish the market value of flights sold by MyTravel as part of package holidays on the basis of the average selling price of flights sold by that taxable person to the same destination or a comparable destination. It will be for that court to make the necessary adjustments to those averages to take account of the fact that, where flights are supplied as part of packages, seats for the children of the package holidaymakers are offered free or at reduced prices.

87. I would therefore propose that the reply to the second question should be that it is for the national court to establish, in the light of the circumstances of the dispute in the main proceedings, the market value of flights supplied by MyTravel as part of package holidays. The referring court may establish that value on the basis of average values.

V – **Conclusion**

88. In the light of the above considerations I propose that the questions referred by the VAT and Duties Tribunal, Manchester, should be answered as follows:

(1) A travel agent or tour operator who has filled in his VAT return for a tax year using the method laid down by the national legislation transposing the 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, is entitled to recalculate his VAT liability according to the method held by the Court to be consistent with Community law, under the conditions laid down by the applicable national law which must observe the principles of equivalence and effectiveness.

(2) Article 26 of the Sixth Directive must be interpreted as meaning that a travel agent or tour operator who, for a package price, supplies travellers with bought-in services and in-house services must, generally, identify the part of the package price corresponding to the in-house services on the basis of their market value, where that value can be established. In such a case, a taxable person may only use the actual cost method if he proves that that method accurately reflects the actual structure of the package price. Application of the market value method is not subject to the condition that it should be simpler than the method based on actual cost nor to the condition that it should result in a VAT liability identical or similar to that resulting from the method based on actual cost. Accordingly:

– a travel agent or tour operator may not use the market value method at its own discretion;

– the market value method is to be applied for in-house services whose value can be established, even if, in a given tax year, the value of certain in-house components of the package price cannot be established because the taxable person does not sell similar services without the package.

(3) It is for the national court to establish, in the light of the circumstances of the dispute in the main proceedings, the market value of flights supplied by MyTravel as part of package holidays. The referring court may establish that value on the basis of average values.

1 – Original Language: French.

2 – 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).

3 – Joined Cases C-308/96 and C-94/97, [1998] ECR I-6229.

4 – ‘MyTravel’.

5 – Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraph 15, and *Madgett and Baldwin*, paragraph 18.

6 – Case C-149/01 *First Choice Holidays* [2003] ECR I-6289, paragraph 25.

7 – Article 26(1).

8 – The first and second sentences of Article 26(2).

9 – Under Article 11A(1)(a) of the Sixth Directive:

‘The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies;’.

10 – Article 26(4).

11 – ‘The Commissioners’.

12 – ‘The TOMS Scheme’.

13 – Paragraph 19.

14 – Paragraphs 20 to 27.

15 – Paragraphs 20 to 27.

16 – Paragraph 43.

17 – Paragraph 43.

18 – See, inter alia, Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 16; Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 39, and Case C-453/00 *Kühne & Heitz* [2004] ECR I?0000.

19 – See *Denkavit Italiana*, cited above, paragraph 17, and Case C-366/99 *Griesmar* [2001] ECR I?9383, paragraph 74. For a recent application of those principles as regards VAT, see Joined Cases C-453/02 and C-462/02 *Linneweber et Akritidis* [2005] ECR I-0000, paragraphs 41 to 45.

20 – See Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 33; Case C-101/91 *Commission* v *Italy* [1993] ECR I-191, paragraph 24; Case C-118/00 *Larsy* [2001] ECR I-5063,

paragraph 52, and *Kühne & Heitz*, cited above, paragraph 22.

21 – See, inter alia, Case 309/85 *Barra* [1988] ECR 355, paragraph 17, and Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraph 93.

22 – See Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and *Weber's Wine World and Others*, cited above, paragraph 103.

23 – *BP Supergas*, cited above, paragraph 42. See also Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 47.

24 – That point read as follows: 'Deduction of the market value of the in-house services has the advantage of simplicity but does not, as I have stated, reflect precisely the structure of the prices of those services within the package. Whereas with the cost-based method of calculation the taxable margin must be identified on the basis of the common margin, here there is no need to distinguish the different elements of the value of the services. The margin and the cost together constitute the reference value of the in-house services, which need only be deducted from the package price to obtain the value of the bought-in services. Deduction, as described above, of the price paid for the latter services then produces the taxable margin, which is thus obtained without it being necessary to deconstruct the value of the in-house services.'

25 – I added, in points 77 and 78 of my Opinion in that case, that the cost-based method requires a complicated reconstruction of the various elements of the cost price, which cannot be done without apportioning overheads between the in-house services, deduction of which from the package price gives the common margin which will be used to calculate the taxable amount, and the in-house services outside the package. Having recourse to market value also avoids uncertainties to do with the nature of the costs which must be deducted. The third sentence of Article 26(2) of the Sixth Directive provides for the deduction of the actual costs to the travel agent of the bought-in services where those transactions are for the direct benefit of the traveller. It follows that overheads, which do not satisfy that condition but are nevertheless used for the whole of the trader's activity, form part of the taxable margin for the bought-in services but are excluded from the margin for the in-house services. Calculation of the costs would require those overheads to be apportioned between those two categories of services. But the market values of the in-house services already include them and they do not have to be isolated in calculating the margin for the bought-in services.

26 – See Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23, and, as regards more specifically the special scheme laid down by Article 26 of the Sixth Directive, Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 17.

27 – Paragraph 47 of the grounds and paragraph 2, second sentence, of the operative part.

28 – See, inter alia, for a presentation of the VAT system, Case C-317/94 *Gibbs* [1996] ECR I-5339, paragraphs 18 to 24.

29 – See, as regards the notion of 'consideration' appearing in Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16), the judgment in Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 13; as regards the notion of 'consideration' featured in the Sixth Directive, Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 16; Case C-33/93 *Empire Stores* [1994] ECR I-2329, paragraph 18; *Madgett and Baldwin*, cited above, paragraph 40, and Case C-380/99 *Bertelsmann* [2001] ECR I-5163,

paragraph 22.

30 – Point 69.

31 – The rules applicable to the rate of VAT are laid down, principally, in Article 12(3) of the Sixth Directive. According to the versions of that article applicable in the relevant years in this case, the Member States are to fix a standard rate of VAT which is no lower than 15%. They may also fix one or more reduced rates of no less than 5% applicable to certain supplies of goods and services. However, certain Member States have the option, on a transitional basis, of fixing rates lower than those reduced rates (for a presentation of the rates applicable in the different Member States, see the report of the Commission on reduced VAT rates, drawn up in accordance with Article 12(4) of the Sixth Directive, COM(2001) 599 final of 22 October 2001).

32 – *Gibbs*, cited above, paragraph 19, and Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315, paragraphs 28 and 29.

33 – See *Madgett and Baldwin*, paragraph 44. The prices in question were those of the rooms and half board charged by the hotel where guests were not using a package.

34 – Point 72.

35 – I outlined all the reasons which led the Community legislature to make provision for special schemes for such traders in points 3 to 5 and 39 of my Opinion in Case C-321/02 *Harbs* [2004] ECR I-0000.

36 – See, as regards the technical difficulties such apportionment may cause in the case of air transport services, *Commission* v *Germany*, paragraph 12.

37 – Case 100/63 *Van der Veen* [1964] ECR 565, 572; Case 24/64 *Dingemans* [1964] ECR 647, 652; Joined Cases C?9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267, paragraph 30; Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 15; Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 29, and Case C-203/99 *Veedfald* [2001] ECR I-3569, paragraph 31.

38 – The United Kingdom Government points out that flights to Palma (Spain) were sold by MyTravel at 18 different prices in 1997 (paragraph 4.15 of its written observations).