OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 16 June 2005 1(1)

Case C-200/04

Finanzamt Heidelberg

v

iSt internationale Sprach-und Studienreisen GmbH

(Reference for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court) (Germany))

(VAT – Special scheme for travel agents – Organisation of international study trips)

1. In this reference for a preliminary ruling the Bundesfinanzhof (Federal Finance Court (Germany)), seeks a decision from the Court of Justice as to whether the special scheme for travel agents laid down in Article 26 of 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 (2) ('the Sixth Directive') applies to transactions entered into by undertakings which organise study programmes abroad, particularly language study programmes.

I – **Facts of the case in the main proceedings, the relevant provisions of Community law and national law and the question referred to the Court of Justice**

2. ISt internationale Sprach- und Studienreisen GmbH ('the applicant' or 'iSt') is a private limited company which organises international language study and learning trips, offering, inter alia, 'High School' and 'College' programmes.

3. The High School Programmes are aimed at students aged between 15 and 18 who wish to attend a high school or similar institution abroad – principally in anglophone countries – for periods of three, five or 10 months. Candidates for these programmes submit an application form to the applicant, which decides, after an interview, whether or not to accept the application.

4. The applicant undertakes to secure places for the participants in the selected high school, where they are allocated a mentor (a guidance teacher) who gives them advice and support. For the duration of the visit the students are provided with accommodation with host families. The selection of suitable host families is carried out in cooperation with a local partner organisation of the applicant. A representative of that partner organisation is available to the student both for discussion at the school and at the home of the host family. The local partner organisation also offers the students the opportunity to tour places of interest by bus or plane during their stay in the host country.

5. The total price of a High School Programme in the United States of America, for example, included return flights from Frankfurt-am-Main to the USA, with a guide, connecting flights within Germany, connecting flights within the USA to and from the destination, board and lodging with the host family, high school tuition, support from the partner organisation and its local representatives during the visit, preparatory meetings, supporting material and travel insurance. The total price did not, however, include pocket money or sickness, liability and accident insurance, the cost of an entry visa for the USA or of participation in a preparatory seminar.

6. The 'College' Programmes are aimed at school-leavers. The local partner organisation allocates the participants to colleges and ensures that they are enrolled in the respective colleges for a period of one to three terms. The partner organisation also pays the college fees out of the sums it receives from the applicant for its services. College Programme participants are provided with board and lodging at the college itself. The arrangements relating to return flights are also different from those which apply under the High School Programme. The participants book the flights themselves.

7. The Finanzamt Heidelberg (Heidelberg Tax Office) (the 'Finanzamt'), initially classified the transactions entered into by the applicant as travel services within the meaning of Paragraph 25 of the Umsatzsteuergesetz (Law on Turnover Tax) 1993 ('UStG') laying down the system of taxation applicable to the provision of travel services. Subsequently, however, following an inspection, the Finanzamt concluded that those services were not travel services but rather 'other services' which were exempt by virtue of Paragraph 4(23) of the UStG.

8. Under the terms of that provision the following are exempt: '[t]he provision of board and lodging and other benefits in kind by persons and organisations where those services are mainly provided to young persons for education, basic training or further training purposes or for the purposes of infant child care, where the services are provided to the young persons or to persons who are involved in their education, basic training, further training or care …'.

9. For its part, Paragraph 25 of the UStG on the taxation of travel services provides as follows:

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

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

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

(4) By way of exception to Paragraph 15(1), the undertaking may not deduct the amount of input tax charged on invoices for travel-related inputs. The remaining provisions of Paragraph 15 shall apply in full. …'

10. Paragraph 25 of the UStG is intended to transpose Article 26 of the Sixth Directive, which sets out the 'special scheme for travel agents' in the following terms:

'(1) Member States shall apply value added tax to the operations of travel agents in accordance with the provisions of this article, where the travel agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. This article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11A(3)(c). In this article travel agents include tour operators.

(2) All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services. The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of the service shall be the travel agent's margin, that is to say, the difference between the total amount to be paid by the traveller, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller.

(3) If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the travel agent's service shall be treated as an exempted intermediary activity under Article 15(14). Where these transactions are performed both inside and outside the Community, only that part of the travel agent's service relating to transactions outside the Community may be exempted.

(4) Tax charged to the travel agent by other taxable persons on the transactions described in paragraph 2 which are for the direct benefit of the traveller, shall not be eligible for deduction or refund in any Member State.'

11. Article 13A(1) of the Sixth Directive states that:

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

…

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

…'

12. Following the Finanzamt's refusal to accept taxation of the applicant's margin under Paragraph 25 of the UStG and its decision instead to classify the applicant's business activity as exempt within the meaning of Paragraph 4(23) of the UStG, which does not allow any deduction of input tax, the Finanzamt reduced the excess tax charged for the years 1995 to 1997.

13. The applicant brought an action contesting that decision before the Finanzgericht, which granted the application. The Finanzamt brought an appeal against the decision of the Finanzgericht before the Bundesfinanzhof, which has decided to stay the appeal proceedings and to refer the following question to the Court of Justice of the European Communities:

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

II – **Analysis**

14. Article 26 of the Sixth Directive lays down the special VAT scheme for travel agents and tour operators on which the Court of Justice has already had an opportunity to give judgment, in particular in order to define the scope of application of that scheme and to determine which traders are covered by the scheme. (3)

15. That special tax scheme was included in the Sixth Directive because the services offered by travel agents and tour operators generally consist of multiple services (for example transport and accommodation), supplied either within or outside the Member State in which the undertaking has established its business or has a fixed establishment. Therefore 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. (4)

16. Article 26 is therefore intended to adapt the applicable VAT rules to the specific nature of the activity of travel agents. (5) To that end it establishes a special taxation scheme which allows appropriate taxation of travel services whilst not in any way constituting an exemption scheme.

17. This case will therefore seem surprising from the first to those who are unfamiliar with the common system of value added tax and, in particular to those who are unaware of the subtleties of the scheme for tax deduction. Counter?intuitively, it is in fact the German Government, as represented by the Finanzamt, which takes the view that the activity of the iSt should fall within the scope of the VAT exemption scheme. The taxable person, on the other hand, challenges that interpretation and maintains that its business activities are liable to VAT by virtue of Article 26.

18. In the terms of the preceding analysis, I find the view taken by the German Government indefensible, having regard in the first place to the interpretation put upon Article 26 by the Court of Justice, in particular in *Van Ginkel* and *Madgett and Baldwin*.

19. It is certain that Article 26, because it establishes a special taxation scheme different from the normal scheme laid down in the Sixth Directive, must be applied only to the extent necessary to attain the objectives which it pursues. (6)

20. Now, in *Van Ginkel*, in an interpretation based on the ratio referred to above of Article 26, (7) the Court held that the fact that an undertaking did not arrange transport for the traveller, but

provided accommodation only, did not exclude the services provided by that undertaking from the ambit of Article 26. (8) The interpretation of Article 26 within those bounds follows, according to the Court, from the objectives pursued by that provision. (9)

21. Following that same line of interpretation, the Court expressly stated in *Madgett and Baldwin* that the special scheme for travel agents could not be limited only to traders with the formal title of 'travel agent' or 'tour operator'. The Court held that the scheme at issue was applicable to an hotelier who, in return for a package price, habitually offered his customers, in addition to accommodation, return transport between certain distant pick-up points and the hotel and a coach excursion during their stay at the hotel. (10)

22. According to that case-law, any taxable person who sells travel services in his own name, using for that purpose supplies and services provided by other taxable persons, must be covered by Article 26 of the Sixth Directive. In contrast, when a trader acts merely as an intermediary, that special scheme under Article 26 does not apply and the services provided must be taxed in accordance with the normal rules for VAT applicable to the taxation of services provided by intermediaries. (11)

23. It is certainly important to know what the criterion would be which would make it possible to determine whether a trader, providing in his or her own name travel-related services together with other services which do not to start with constitute travel services, such as educational services, must be regarded as subject to the rules laid down in Article 26 of the Sixth Directive.

24. To this end, the decisive criterion adopted in *Madgett and Baldwin*, which expressly follows the line taken by Advocate General Léger in his Opinion in that case, consists of the distinction between the trader's ancillary services and his principal services, or services equivalent to the latter. (12)

25. In fact, the Court of Justice points out that there are traders who provide travel-related services, using for that purpose services brought in from third parties, those services being, however, of a purely ancillary nature. In that respect, Advocate General Léger expressly stated in his Opinion, a point specifically taken up in the judgment, (13) that: '… a service is ancillary if, first, it contributes to the proper performance of the principal service and, second, it takes up a marginal proportion of the package price compared to the principal service. It does not constitute an object for customers or a service sought for its own sake, but a means of better enjoying the principal service'. (14) That would be exactly: 'the case, for example, with transport which a hotel might arrange locally to take its customers to nearby destinations'. (15)

26. By contrast, travel-related services also provided on a regular basis by traders in their own name, using for that purpose services brought in from third parties, which take up a significant proportion of the total cost to the traveller, would not be regarded as ancillary services, nor would the customers regard them as purely ancillary. (16)

27. Following that criterion the Court of Justice held in *Madgett and Baldwin*, that: '[w]here, however, a hotelier habitually offers his customers, in addition to accommodation, services which go beyond the tasks traditionally entrusted to hoteliers, and which cannot be carried out without a *substantial effect on the package price charged*, such as travel to the hotel from distant pick-up points, such services are not to be equated with purely ancillary services'. (17) Consequently, Article 26 of the Sixth Directive is applicable to a hotelier 'who, in return for a package price, habitually offers his customers, in addition to accommodation, return transport between certain distant pick-up points and the hotel and a coach excursion during their stay, those transport services being bought in from third parties'. (18)

28. In the light of that determining criterion adopted in *Madgett and Baldwin*, the iSt must be classified as a travel agent within the meaning of Article 26 of the Sixth Directive. In fact, even assuming that the iSt in effect provides educational services to its customers, the provision of travel will inevitably have a ‘substantial effect on the package price charged’ to the customer according to the criterion applied in *Madgett and Baldwin*. That being the case, it is clear that the travel proper, including transport and the stay organised in the host country, could not in the customer’s view be regarded as an ancillary service, with only a marginal significance in relation to the educational service which iSt also provides for its customers.

29. It is important to mention, moreover, that the national court’s uncertainty as to the applicability of Article 26 in the case at issue stems, essentially, from the Court of Justice’s case?law concerning student exchange programmes within the context of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. (19) The question posed is, therefore, whether the definition, in the terms earlier set out, of the activities covered by the scheme laid down in Article 26 of the Sixth Directive must be altered to some extent in the light of the Court of Justice’s recent decisions in this other parallel domain, especially *AFS Intercultural Programs Finland*. (20)

30. In that judgment, the Court ruled that travel consisting of student exchanges of about six months’ or a year’s duration, the purpose of which was attendance by the student at an educational establishment in the host country in order to familiarise himself with its people and its culture, and during which he stays with a host family, as if he were a member thereof, free of charge, does not constitute package travel within the meaning of Directive 90/314/EEC. (21)

31. Clearly, that case-law is of no assistance in answering the central question in the case at issue, which is, as I have already pointed out, simply whether, *within the framework of its activity, the iSt’s provision of travel services is of a purely ancillary nature in relation to the other services which it provides*.

32. In addition, as a subsidiary matter, Article 26 pursues aims very different from those on which Council Directive 90/314/EEC is based, in particular that of preventing the common VAT scheme from obstructing the business activities of travel agents.

33. It is not, therefore, appropriate to give a restrictive interpretation of Article 26, so that it applies only to traders who provide ‘travel’ in their own name within the meaning of Council Directive 90/314/EEC. (22) I would point out in this respect that such an interpretation of Article 26 would be incompatible with *Van Ginkel* in which the Court of Justice held that Article 26 is applicable even if the trader did not provide a travel service proper – that is a service including transport of the customers – but provided accommodation only. (23)

34. Similarly, it would seem to me to be irrelevant in deciding whether the applicant is to be classified as a travel agent within the meaning of Article 26, to take account of the purpose and duration of the trips organised by the trader and offered in his or her own name, using for that purpose services provided by third parties. The fact that the purpose of the stay abroad, as in the present case, is study, in particular of the English language, must not affect the classification of the iSt as a travel agent within the meaning of Article 26. This runs counter to the suggestion of the German Government, which considers that iSt exercises a *sui generis* activity which ought not to fall within the scope of Article 26 by virtue of the educational purpose and length of the trips offered to its customers.

35. It seems to me highly inadvisable to distinguish traders who organise travel and are subject to the rules under Article 26 from others to whom those rules do not apply, according to the purpose

and duration of the travel. Apart from travel purely for leisure, there exists an enormous variety of travel varying according to its objectives. We need think here, in addition to travel to study languages and local culture, only of sports trips, of journeys made for thermal or anti-stress therapy, of cookery and wine-tasting courses or of concert tours of longer or shorter duration undertaken by groups of musicians. Taking the duration and purpose of the travel and stay organised abroad as decisive factors would introduce a huge element of doubt in the determination of the scope of the definition of travel agent within the meaning of Article 26 of the Sixth Directive.

36. The adoption of such a criterion would not only be completely foreign to the wording of Article 26 (which makes no reference to the duration and purpose of travel), but would also be incompatible with the objectives pursued by the special scheme set out therein. Finally, it is not easy to reconcile consideration of the purpose and duration of travel with the idea of simplification which underlies the adoption of the rules set out in Article 26. Quite the reverse: if we look at the simplification objectives arising from the multiplicity of places entailed in the business activities of travel agents, which justify the adoption of the scheme for taxation of the margin laid down in Article 26, they are preserved in the case at issue precisely by regarding the iSt as subject to the scheme set out in that Article. (24)

37. Delimitation of the scope of the definition of travel agent within the meaning of Article 26 according to the purpose of the travel services provided would, in any case, be incompatible with an analysis conducted in accordance with objective criteria, which is clearly essential in the context of a tax scheme of a clearly objective nature, as is the case for VAT. (25)

38. It is only by means of an autonomous and non?restrictive interpretation of the concept of travel agent, based on an objective criterion such as that expressly used by the Court in *Madgett and Baldwin*, which does not rely on any consideration of the purpose or duration of travel, that distortion of competition between traders my be avoided and uniform application of the Sixth Directive be guaranteed. (26)

39. Finally, I would point out that Article 26 lays down appropriate taxation for travel services. It entails special rules in relation to the normal rules of taxation, but not a VAT exemption scheme.

40. Taking that into consideration, the interpretation proposed by the German Government, to the effect that the activity of the iSt falls within services which are exempt by virtue of Article 13A(1)(i) of the Sixth Directive, is incompatible with the Court of Justice’s consistent case-law on the interpretation of the provisions of the Sixth Directive which lay down those exemptions.

41. ISt is, in fact, a commercial company and does not in any way appear to be a ‘body governed by public law’ or to be governed by a constitution similar to the terms of Article 13A(1)(i) of the Sixth Directive. The application of this exemption scheme would entail an interpretation of the scheme which was immediately incompatible with the case-law of the Court of Justice, according to which: ‘the terms used to describe the exemptions envisaged by Article 13 of the Sixth Directive are to be interpreted strictly since these constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person’. (27)

III – **Conclusion**

42. In the light of the considerations set out above, I propose that the Court of Justice should reply as follows to the question referred by the Bundesfinanzhof:

‘Article 26 of the Sixth Council Directive 77/388/EEC of 17 May 1977 must be interpreted as applying also to transactions entered into by an undertaking organising “High School” and

“College” programmes involving periods of three to 10 months spent in a foreign country, which are offered to participants by the undertaking in its own name and which are provided using services performed by other taxable persons.’

1 – Original language: Portuguese.

2 – OJ 1977 L 145, p. 1.

3 – See, in particular, the judgments in Case C-163/91 *Van Ginkel* [1992] ECR I?5723 and the judgment in Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I?6229.

4 – See *Van Ginkel,* paragraphs 13 and 14; *Madgett and Baldwin,* paragraph 18 and Case C?149/01 *First Choice Holidays* [2003] ECR I?6289, paragraphs 23 and 24.

5 – See *Van Ginkel,* paragraphs 15 and 23; *Madgett and Baldwin,* paragraph 18 and *First Choice Holidays,* paragraph 23.

6 – See *First Choice Holidays,* paragraph 22, and *Madgett and Baldwin,* paragraph 34.

7 – See points 15 and 16 above.

8 – See *Van Ginkel,* paragraph 27.

9 – As the Court of Justice has held in Paragraph 23 of *Van Ginkel*: ‘… The exclusion from the field of application of Article 26 of the Sixth Directive of services provided by a travel agent on the ground that they cover only the accommodation and not the transport of the traveller would lead to a complicated tax system in which the VAT rules applicable would depend upon the constituents of the services offered to each traveller. Such a tax system would fail to comply with the aims of the directive’.

10 – See the judgment in *Madgett and Baldwin,* paragraph 20: ‘… the underlying reasons for the special scheme for travel agents and tour operators are equally valid where the trader is not a travel agent or tour operator within the normal meaning of those terms, but effects identical transactions in the context of another activity, such as that of hotelier.’

11 – See also, in this connection, the statement of reasons in the Commission’s proposal for a Council Directive amending Directive 77/388/EEC of the Council as regards the special scheme for travel agents (COM/2002/0064 final, OJ 2002 C 126 E, p. 390). The same idea is clearly reaffirmed in the Commission’s new proposal for a directive presented on 8 February 2002. The Commission proposes that the present Article 26, which states that: ‘… travel agents include tour operators’, should be extended to read: ‘… tour operators and any other taxable person who supplies travel services in the same way shall be considered as travel agents’.

12 – See the Opinion of Advocate General Léger in *Madgett and Baldwin,* points 34 to 38.

13 – See the judgment in *Madgett and Baldwin,* paragraph 24.

14 – See the Opinion of Advocate General Léger in *Madgett and Baldwin,* point 36.

15 – *Ibidem*, point 37.

16 – *Ibidem*, point 38.

17 – See the judgment in *Madgett and Baldwin,* paragraph 26. Italics added.

18 – *Ibidem*, paragraph 27.

19 – OJ 1990 L 158, p. 59.

20 – See the judgment in Case C-237/97 *AFS Intercultural Programs Finland* [1999] ECR I-825.

21 – *Ibidem*, paragraph 33 and the operative part.

22 – I do not think, in any case, that it is possible to draw the conclusion from the *AFS Finland* judgment that iSt should not be classified as a travel organiser or retailer within the meaning of Council Directive 90/314/EEC. As the applicant quite rightly points out in its written observations, the iSt is not a non-profit?making organisation, unlike the association at issue in the *AFS Finland* Judgment.

23 – See point 24 above.

24 – According to the decision making the referral, iSt organises travel which it offers to its clients in its own name, including transport to the destination, as well as reception in the educational establishments and within the host families. iSt does not act as an intermediary for the airlines or for the partner organisation in the host country; moreover the relevant services are provided or performed in a number of places, which, in the light of the ratio behind Article 26, fully justifies application of that Article.

25 – One of the guiding principles of the VAT system is the avoidance of factors which might give rise to distortion of competition at national or Community level. Advocate General Léger makes the point in point 32 of his Opinion in *Madgett and Baldwin* and it is repeated in paragraph 22 of the judgment that: '… such distortion could be avoided by interpreting Article 26 as covering comparable activities *in accordance with objective criteria*, and not based on the predetermined classification of a trader within a certain professional category, even though a significant part of his business activity entails providing services which fall within another category'. Emphasis added.

26 – See in this connection the judgment in *Madgett and Baldwin,* paragraph 22 and the Opinion of Advocate General Léger in that case, point 32.

27 – See the judgment in Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 13, the judgment in Case C-2/95 *Sparekassernes Datacenter(SDC)* v *Skatteministeriet* [1997] ECR I?3017, paragraph 20 and, more recently, the judgment in Case C-472/03 *Staatssecretaris van Financiën* v *Arthur Andersen* [2005] ECR I?0000, paragraph 24.