JUDGMENT OF THE COURT (Fifth Chamber)
20 February 1997 *

In Case C-260/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court of Justice (Queen's Bench Division) of England and Wales for a preliminary ruling in the proceedings pending before that court between

Commissioners of Customs and Excise

and

DFDS A/S

on the interpretation of Article 26 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, L. Sevón, D. A. O. Edward, J.-P. Puissochet (Rapporteur) and M. Wathelet, Judges,

* Language of the case: English.

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— DFDS A/S, by K. P. E. Lasok QC, instructed by A. Fishleigh, of Garrett & Co., Solicitors,

— the United Kingdom Government, by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, and S. Richards and P. Mantle, Barristers,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by M. Fiorilli, Avvocato dello Stato,

— the Commission of the European Communities, by P. Oliver and E. Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of DFDS A/S, represented by K. P. E. Lasok; of the United Kingdom Government, represented by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, and S. Richards and P. Mantle; of the German Government, represented by Ernst Röder, Ministerialrat, Federal Ministry of the Economy, acting as Agent; and of the Commission, represented by P. Oliver and E. Traversa, at the hearing on 7 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1997,

gives the following

Judgment

1 By order of 18 July 1995, received at the Court on 4 August 1995, the High Court of Justice (Queen's Bench Division) of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 26 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 That question has been raised in proceedings between the Commissioners of Customs and Excise and the Danish company DFDS A/S (hereinafter 'DFDS') concerning the latter's liability to value added tax (hereinafter 'VAT') in the United Kingdom in respect of package tours sold on its behalf by its English subsidiary, DFDS Ltd.

3 Article 26 of the Sixth Directive lays down a special scheme for travel agents which applies to their transactions and those of tour operators, where they deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. Article 26(2) provides:

'All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services.

The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of this service shall be the travel agent's margin, that is to say, the difference between the total amount to be paid by the traveller, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller'.

4 According to the documents forwarded by the national court, the special scheme provided for by Article 26 of the Sixth Directive was implemented in the United Kingdom by the Value Added Tax (Tour Operators) Order 1987. By virtue of Article 3(1) of that order, the scheme applies to goods or services which are *inter alia* supplied 'by a tour operator in a Member State ... in which he has established his business or has a fixed establishment'. Article 5(2) of the same order provides that a travel service 'shall be treated as supplied in the Member State of the European Community in which the tour operator has established his business or, if the supply was made from a fixed establishment, in the Member State in which the fixed establishment is situated and in no other place.'

5 DFDS, a company incorporated in Denmark, whose objects are shipping, travel and general transport, has an English subsidiary, DFDS Ltd. An agency agreement concluded by the two companies designates the subsidiary as a 'general sales and port agent' for the parent company in the United Kingdom and as 'central booking office for the United Kingdom and Ireland for all ... the passenger services' of the Danish company.

6 In 1993 the Commissioners of Customs and Excise took the view that VAT was payable by DFDS on the package tours marketed on its behalf by its English

subsidiary. They took the view that, by means of the agreement with its subsidiary, the Danish company established its business in the United Kingdom or made the supplies in question from a fixed establishment in the United Kingdom within the meaning of those terms in the United Kingdom legislation giving effect to Article 26 of the Sixth Directive.

7 DFDS, on the contrary, contended that the services at issue were taxable at the place where it had established its business, namely Denmark, a Member State which has availed itself of the possibility of exempting such services from VAT under Article 28(3)(b) and Annex F of the Sixth Directive. It therefore appealed to the Value Added Tax Tribunal, which found in its favour in 1994.

8 On a further appeal, the High Court of Justice considered that the case raised a problem of interpretation of the Sixth Directive and referred the following question to the Court of Justice for a preliminary ruling:

'On the proper interpretation of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (the Sixth VAT Directive), and in particular Article 26 thereof, where a tour operator has its headquarters in Member State A but supplies services in the form of package tours to travellers through the agency of a company in Member State B:

(a) in what (if any) circumstances is the supply of those services by the tour operator taxable in Member State B?

(b) in what (if any) circumstances can it be said that the tour operator "has established [its] business" in Member State B or "has a fixed establishment from which [it] has provided the services" in Member State B?'

9 The national court, in submitting that two-part question, seeks to determine under what conditions the services which a tour operator established in one Member State provides to travellers through the intermediary of a company operating as an agent in another Member State are liable to VAT in the latter State under Article 26 of the Sixth Directive.

10 DFDS proposes that the Court rule that, in the circumstances described, the supplies are taxable in the Member State in which the tour operator has his headquarters. It submits in particular that, according to the case-law of the Court, the Member State in which the company has established its business is the primary fiscal point of reference for the levying of VAT on supplies of services and that any other point of reference might be misleading and give rise to conflicts between Member States.

11 The United Kingdom Government contends, on the other hand, that the tour operator has, in the Member State in which the company acting on his behalf operates, a fixed establishment from which the services are supplied, so that they must be taxed in that State. In its opinion, that is the most rational course from the tax point of view since it is in that State that the services are made available to travellers.

12 The Italian Government and the Commission consider that, if certain conditions are met, such supplies of services are taxable in the Member State in which the

company acting on behalf of the tour operator operates. For that to be the case, there must be in that State an organization with the human and technical resources necessary for the provision of those services and that organization must not be independent from the undertaking on whose behalf it acts.

13 Article 26 of the Sixth Directive contains special VAT rules for travel agents and tour operators. The services provided by those undertakings consist of multiple services, concerning, in particular, transport and accommodation, rendered both within and outside the territory of the Member State in which the undertaking has established its business or has a fixed establishment. Application of the general rules on place of taxation, taxable amount and deduction of input tax would therefore entail practical difficulties for those undertakings of such a nature as to obstruct their operations (see Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraphs 12 to 14).

14 Article 26(1) makes the application of that article subject to the condition that the travel agent, or the tour operator, is to deal with customers in his own name and not as an intermediary (*Van Ginkel*, paragraph 21).

15 In the situation described in the order for reference, it is the Danish company, DFDS, which, as tour operator, falls within the scope of that article, and not its English subsidiary DFDS Ltd, which acts not in its own name but as an intermediary.

16 As regards the place of taxation, Article 26(2) provides that the services of a travel agent are to 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.

17 As has been pointed out by all the participants in these proceedings, that provision uses the same concepts of place where a supplier's business is established and fixed establishment as those used in Article 9(1) of the Sixth Directive to define the two main fiscal points of reference which may be applied to supplies of services in general. It is therefore appropriate to refer to the rules arising from that definition of place of supply.

18 As the Court stated in paragraph 14 of its judgment in Case 168/84 *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251, Article 9 is designed to secure the rational delimitation of the respective areas covered by national VAT rules by determining in a uniform manner the place where services are deemed to be provided for tax purposes and in particular to avoid conflicts of jurisdiction between Member States.

19 It is for the tax authorities of each Member State to determine, from the range of options set forth in the Sixth Directive, which point of reference is most appropriate to determine tax jurisdiction in respect of a given service. According to Article 9(1), the place where the supplier has established his business is a primary point of reference inasmuch as regard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has

established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State (*Berkholz*, paragraph 17).

20 Moreover, services cannot be deemed to be supplied at an establishment other than the place where the supplier has established his business unless that establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present (*Berkholz*, paragraph 18).

21 In this case, to treat, for tax purposes, all the services provided by a tour operator, including those supplied in other Member States through undertakings operating on his behalf, as being supplied from the place where the tour operator has established his business, would have the clear advantage, as DFDS has pointed out, of having a single place of taxation for all the business of that operator covered by Article 26 of the Sixth Directive.

22 However, as the United Kingdom Government has pointed out, that treatment would not lead to a rational result for tax purposes in that it takes no account of the actual place where the tours are marketed which, whatever the customer's destination, the national authorities have good reason to take into consideration as the most appropriate point of reference.

23 As the Advocate General points out in paragraphs 32 to 34 of his Opinion, consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system. The alternative approach for determining the place of taxation of the services of travel agents, based on the fixed establishment from which these services are supplied, is specifically intended to take account of the possible diversification of travel agents' activities in different places within the Community. Systematic reliance on the place where the supplier has established his

business could in fact lead to distortions of competition, in that it might encourage undertakings trading in one Member State to establish their businesses, in order to avoid taxation, in another Member State which has availed itself of the possibility of maintaining the VAT exemption for the services in question.

24 In those circumstances, it must be concluded that, where services have been provided by a tour operator from a fixed establishment which that operator has in a Member State other than that in which he has established his business, such supply of services to the customer is taxable in the State where that fixed establishment is located.

25 In order to determine whether, in circumstances such as those of this case, the travel agent actually has such an establishment in the Member State in question, it is necessary first to ascertain whether or not the company operating in that State on behalf of the agent is independent from him.

26 The fact, mentioned by the VAT Tribunal, that the premises of the English subsidiary, which has its own legal personality, belong to it and not to DFDS is not sufficient in itself to establish that the subsidiary is in fact independent from DFDS. On the contrary, information in the order for reference, in particular the fact that DFDS's subsidiary is wholly owned by it and as to the various contractual obligations imposed on the subsidiary by its parent, shows that the company established in the United Kingdom merely acts as an auxiliary organ of its parent.

27 Second, it is necessary to verify whether, in accordance with the case-law cited in paragraph 20 of this judgment, the establishment in question is of the requisite minimum size in terms of necessary human and technical resources.

28 It is apparent from the facts set out in the order for reference, particularly as regards the number of employees of the company established in the United Kingdom and the actual terms under which it provides services to customers, that that company does display the features of a fixed establishment within the meaning of the abovementioned provisions.

29 The answer to be given to the national court must therefore be that Article 26(2) of the Sixth Directive is to be interpreted as meaning that, where a tour operator established in one Member State provides services to travellers through the intermediary of a company operating as an agent in another Member State, VAT is payable on those services in the latter State if that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment.

Costs

30 The costs incurred by the United Kingdom, German and Italian Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the High Court of Justice (Queen's Bench Division) of England and Wales by order of 18 July 1995, hereby rules:

Article 26(2) of the Sixth Council Directive (77/388/EEC) of 17 May 1977, on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, is to be interpreted as meaning that, where a tour operator established in one Member State provides services to travellers through the intermediary of a company operating as an agent in another Member State, VAT is payable on those services in the latter State if that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment.

Moitinho de Almeida Sevón Edward

Puissochet Wathelet

Delivered in open court in Luxembourg on 20 February 1997.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber