OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 12 September 2002 [1]

1. By order of 13 March 2001, the Court of Appeal (England and Wales) (Civil Division) ('the Court of Appeal') referred to the Court of Justice under Article 234 EC a question for a preliminary ruling concerning Article 26(2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the rules of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment ('the Sixth Directive'). [2] In particular, the Court of Appeal wishes to know whether or not the term 'total amount to be paid by the traveller' contained in Article 26(2) includes the amount that a travel agent acting as agent on behalf of a tour operator has paid to the latter in addition to the price paid by the customer for a package holiday.

I — Legal background

A — *Community law*

2. Article 26 of the Sixth Directive establishes a special scheme for determining the taxable amount for the purposes of the value added tax (hereinafter 'VAT') applicable to certain operations of travel agents and tour operators. In particular, Article 26(1) and (2) provide that:

'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.

1 — Original language: Italian.

2 — OJ 1977 L 145, p. 1. Subsequent amendments to the Sixth Directive, the last introduced by Council Directive 2001/4/EC of 19 January 2001 (OJ 2001 L 22, p. 17), have not altered the text of Article 26 with which the present case is concerned. That provision is, instead, the subject of a proposal for amendment of the directive currently before the Council [COM (2002) 64 def.].

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 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.'

B — *National law*

3. The special scheme under Article 26 of the Sixth Directive is known in the law of the United Kingdom as the Tour Operators' Margin Scheme (hereinafter 'the TOMS'). It is governed by section 53 of the Value Added Tax Act 1994 and by the Value Added Tax (Tour Operators) Order 1987. The operation of the TOMS is further set out in detail in VAT Leaflet 709/5/88 produced by the Commissioners of Customs & Excise (hereinafter 'the Commissioners'). [3]

II — Facts, the proceedings before the national court and the questions referred for a preliminary ruling

A — *Facts giving rise to the dispute in the main proceedings*

4. As stated in the order for reference, First Choice Holidays plc ('First Choice') organises 'package' holidays which, presented in a brochure, are sold to the public by travel agents. The contracts governing relations between First Choice and its agents provide merely that, for every holiday sold, the agent must pay to the principal the relevant brochure price, whereupon he becomes entitled to a commission calculated as a percentage (usually 10%) of that price. Those contracts are silent, however, as to the prices to be charged to the customers, leaving the agents free to offer discounts on the brochure prices. In short, therefore, each time a discount is given it is for the agents ultimately to bear the cost of the difference between the brochure price of the holiday sold and the price in fact paid by the customer for that holiday.

3 — The Commissioners of Customs & Excise are responsible for the administration and collection of VAT in the United Kingdom.

5. Again according to the order for reference, First Choice is generally unaware either of the fact that its own holidays are sold at a discount or of the extent of the discounts given. The customers, for their part, are unaware of the financial arrangements between First Choice and its agents. It further appears from the order for reference that the amount of the discounts in question is, in most cases, less than the commission owed by First Choice to the agent, though it may at times equal it or even exceed it.

6. Specifically, then, upon the sale of a holiday, the agent collects the price from the customer and remits it to First Choice, supplementing it where necessary by an amount equal to the discount given. At the same time, however, the agent deducts from the amount owed to First Choice the commission due to it for the sale, together with the VAT thereon. The final payment received by First Choice is therefore net of the commission owed to the agent and of the VAT payable on that commission.

B — *Proceedings before the national court and the question referred for a preliminary ruling*

7. It appears from the documents in the file that until 1998 First Choice calculated its own taxable margin for the purposes of applying the TOMS on the basis of the full amount paid to it by the travel agents, regardless of whether those agents had granted discounts to the customers or not. However, by letter of 29 September 1998, it then claimed a refund from the Commissioners of VAT paid in the sum of GBP 921 456, submitting that, in calculating the taxable margin, account had to be taken only of the price of the holidays in fact paid by the customers, and not of the amounts corresponding to any discounts given by the travel agents and remaining payable by the latter. The Commissioners did not accept that interpretation and therefore rejected First Choice's claim by letter of 9 October 1998.

8. First Choice then challenged the Commissioner's refusal before the London VAT & Duties Tribunal which, by decision of 22 November 1999, upheld the application. That tribunal held that the difference between the brochure price for the holiday and the price in fact paid by the customer, which remains payable by the travel agents to First Choice, is not to be included in the calculation of the taxable margin for the purposes of applying the TOMS. The Commissioners appealed against that decision to the Chancery Division of the High Court of Justice which, however, by judgment delivered on 28 June 2000, upheld the decision at first instance. In that judgment the High Court held that the difference in price paid by the travel agents to First Choice did not constitute an amount 'to be paid by the traveller' within the meaning of Article 26(2) of the Sixth Directive. Apart from this, the High Court held in any event that the finding of the VAT & Duties

Tribunal according to which that amount represents the amount paid by the travel agent to First Choice for the facility provided to them by the latter to determine the selling price of the holidays as they saw fit constitutes a finding of fact which cannot be disturbed on appeal. [4]

9. The Commissioners then brought an appeal against the judgment of the High Court before the Court of Appeal, Civil Division, which stayed proceedings and referred to the Court of Justice for a preliminary ruling:

'Where a tour operator within the meaning of Article 26 of Council Directive 77/388/EEC

(a) supplies package holidays to customers through the disclosed agency of a travel agent;

(b) permits the agent to arrange the supply of package holidays at a discount from the price published in the tour operator's brochure (the customer being liable to pay only the discounted price for the holiday);

(c) requires the agent who arranges the supply of a package holiday at a discount not only to pass on to the tour operator the price actually charged to the customer but also to pay to the tour operator an additional sum equal to the discount given to the customer (who is unaware of the financial arrangements between the tour operator and the agent), so that the agent accounts to the tour operator for the full brochure price of the holiday;

(d) agrees to pay the agent a commission based on the brochure price of the holiday, which in practice is paid by set-off against the sums due from the agent as mentioned in (c) above;

(e) does not know whether or not the agent has arranged the sale of a particular holiday at a discounted price, or the amount of the discount;

4 — It is apparent from the order for reference (page 4, point 6) that in the judicial system of the United Kingdom, it is for the VAT & Duties Tribunal, when seised of an application relating to VAT, to make the relevant findings of fact in the case. The possible grounds of appeal against decisions of the Tribunal are limited to points of law (section 11 of the Tribunals and Inquiries Act 1992).

(f) as between itself and the agent, accounts for the sale of the holiday on the basis that it has been paid the full brochure price of the holiday;

1. Having established the above facts, how should the additional sum (referred to in (c) above) paid by the travel agent to the tour operator be characterised for the purposes of Article 26.2?

2. Does "the total amount to be paid by the traveller" within Article 26.2 include the additional sum referred to in (c) above?'

III — Procedure before the Court

10. In the course of the written stage of the procedure, First Choice, the United Kingdom, the Federal Republic of Germany and the Commission of the European Communities submitted written observations to the Court. With the exception of the German Government, all those participants in the proceedings also presented oral argument at the hearing on 14 March 2002.

IV — Legal analysis

A — *Preliminary considerations as to the purpose and scope of the question referred*

11. In embarking on an analysis of the question referred by the Court of Appeal, it is first necessary to clarify the purpose and scope of that question, in particular in the light of the arguments of a procedural nature centred on the first part thereof, which First Choice even suggests should be reformulated.

12. I therefore begin with the first part of the question. If I have understood the arguments correctly, First Choice seeks to argue that, according to the division of jurisdiction laid down by Article 234 EC, it is for the national court to make a determination as to the categorisation in law, for the purposes of Article 26(2) of the Sixth Directive, of the additional amount paid by the travel agent to the tour operator, in the circumstances indicated in that question. In its opinion such a determination is concerned not with the interpretation of the provision of Community law in question, which is a matter for the Court of Justice, but with the application of that provision to the facts in the main proceedings, which is, instead, a matter for the national court. [5]

5 — On this subject First Choice refers to the judgment in Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, in particular paragraph 11.

13. Second, First Choice adds, as a matter of national law the categorisation of the relevant facts in the case has already been made by the VAT & Duties Tribunal, whilst what is in issue before the referring court is the possibility, in the light of the rules of domestic procedural law, of disturbing that categorisation on appeal. In that context the first part of the question should therefore be taken to be directed, in reality, to ascertaining whether, as, according to First Choice, the Commissioners submitted before the Court of Appeal, Community law precludes the application of the rules of United Kingdom procedural law in so far as these prevent the VAT & Duties Tribunal's categorisation of the facts from being challenged on appeal.

14. For my part, I take the view, however, that a reformulation of the first part of the question in the terms suggested by First Choice, which moreover the United Kingdom and the Commission oppose, is not justified. In that regard, I must point out that, for the purposes of the cooperation between the national courts and the Court of Justice established by Article 234 EC, it is for the latter, when seised of questions formulated inappropriately or which exceed the limits of its jurisdiction, to extract from all the information provided by the national court, and in particular from the grounds of the order for reference, the points of Community law which require interpretation, having regard to the subject-matter of the dispute in the main proceedings. In those circumstances the Court will, where necessary, reformulate the questions referred to it. [6]

15. However, whilst it is true that the question formulated by the Court of Appeal reflects precisely the facts underlying the dispute before it, that does not mean that this Court is thereby being asked to rule directly on those facts, going beyond the functions assigned to it by Article 234 EC. [7] From a reading of the question it seems to me that it must be inferred, instead, that the facts therein mentioned, albeit in general terms, by the national court serve only to circumscribe the extent of the legal problem in relation to which that court is seeking a ruling from the Court of Justice.

16. In any event, from an examination of the file in the case, it is clear that the relevant point of law for the resolution of the main proceedings, on which the Court should rule, is not at all that stated by First Choice, namely the possible conflict between Community law and the rules of United Kingdom procedural law in the matter of appeals. On the contrary, it is

6 — See, *ex multis*, Case 35/85 *Teissier* [1986] ECR 1207, paragraph 9 and, more recently, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 34, containing further references; Joined Cases C-223/99 and C-260/99 *Agorà e Excelsior* [2001] ECR I-3605, paragraph 24. See also the Opinion of Advocate General Léger in Case C-175/99 *Mayeur* [2000] ECR I-7755, point 25.

7 — As to the distinction between the interpretation and application of Community law in proceedings under Article 234 EC in an earlier case in which the Court was asked expressly to rule on the facts of the case before the national court see the Opinion of Advocate General Jacobs in Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 8 to 13.

expressly indicated in the grounds of the order for reference that the national court is concerned with the question as to what interpretation to give to the concept 'total amount to be paid by the traveller' in Article 26(2) of the Sixth Directive, in order to determine correctly its scope. [8] That is, in my opinion, the point which the Court is called upon to address in the present proceedings.

17. More specifically, I consider that, taken as a whole, the question referred by the Court of Appeal is directed to establishing whether the additional amount paid by the travel agent to the tour operator must be regarded as part of the 'total amount to be paid by the traveller' for the purpose of calculating the operator's taxable margin within the meaning of Article 26(2) of the Sixth Directive. On a proper view, the two parts of the question have in reality the same purpose: to ask what is the legal categorisation of the additional amount in question for the purposes of Article 26(2) seems to me to be no different than asking whether the same amount falls within the concept 'the total amount to be paid by the traveller'. In both cases, the question is essentially whether the payment made by the travel agent can be treated as a payment for the service provided to the traveller by the tour operator.

8 — See in particular paragraphs 2, 7, 9, 11 and 12 of the grounds of the order for reference (pages 13 to 16).

18. I will therefore address the two parts of the question together from now on.

B — *The substance of the question referred for a preliminary ruling*

19. Turning now to the substance of the question referred for a preliminary ruling, in the formulation that I have suggested, I consider that it is advisable to proceed by stages, establishing first and foremost whether the concept 'total amount to be paid by the traveller' in Article 26(2) also covers the amounts paid by third parties to a travel agent or (in the circumstances of the present case) to a tour operator. If that is the case, it will then be necessary to determine whether the 'additional amount' paid by the travel agent in the particular circumstances indicated by the referring court falls within that concept.

20. On the first point, First Choice's position may be summarised as follows. It contends that the scheme laid down by Article 26 of the Sixth Directive constitutes an exception to the general rules for the determination of the taxable amount laid down in Article 11 of that directive, and not a particular case of the application of those rules. It is therefore wrong to interpret the expression 'total amount to be paid by the traveller' in Article 26(2) in the light of the concept of consideration adopted in Article 11 of the directive, which, under

A(1)(a), includes all sums which have been paid for a supply of services, regardless of whether these are paid by the recipient of the services or by a third party. [9] According to First Choice, in contrast to what happens under the general scheme under Article 11, in the context of the special scheme for travel agents and tour operators under Article 26(2), what matters is only the specific relationship existing between the recipient and the supplier of services, that is, between the traveller and (in the circumstances of the present case) the tour operator. In those circumstances, any sums paid by a third party to the tour operator could fall within the concept of 'total amount to be paid by the traveller' only where the third party acted as agent or representative of the traveller.

21. The United Kingdom, the Federal Republic of Germany and the Commission take the opposite view. In particular, the United Kingdom and, up to a point, the Federal Republic of Germany contend that, as with all derogating measures, the derogation from the general scheme of the Sixth Directive introduced by Article 26 thereof must be limited to what is strictly necessary to attain the objective envisaged by that provision, namely to simplify the application of the general scheme of VAT in the particular context of the operations of travel agents, where such application might give rise to considerable practical difficulties. In that perspective there is no reason to consider that Article 26(2) derogates from the concept of consideration under Article 11A(1)(a). Therefore, contrary to the assertion of First Choice, reference must be made specifically to the latter concept in interpreting the expression 'total amount to be paid by the traveller' in Article 26(2). That expression must therefore be taken as covering the amounts paid by a third party in relation to the supply of a service provided by the tour operator, that is to say, in relation to the holiday taken by the customer.

22. For its part, the Commission insists in particular that the inclusion in the 'total amount to be paid by the traveller' of all that is paid to the tour operator for the service supplied to the traveller, including the amounts paid by third parties, is in accordance with a general principle in this sphere. If that were not so, an unwarranted distinction would be created between the special scheme laid down in Article 26 and the ordinary scheme of VAT. Since the latter scheme takes into account, for the purposes of determining the taxable amount, all that is paid to the supplier for the service provided, regardless of whether the payment is made by the recipient of the service, by the purchaser or by a third party, that scheme would be less favourable than the special one.

9 — I would recall that under Article 11A(1)(a) of the Sixth Directive, for most supplies of services, the taxable amount is stated to be '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'.

23. Of the opposing points of view, I agree with the second. I would observe, first, that, as has been rightly pointed out, the scheme laid down by Article 26 of the Sixth Directive is intended to adjust the ordinary scheme of VAT in terms of the place of taxation, the taxable amount and the deduction of input tax, to the particular characteristics of the business of travel agents and in particular to the objective of avoiding the difficulties arising from the application of that scheme. [10] Next, it has been rightly pointed out that, since it constitutes an exception to the ordinary scheme of the Sixth Directive, the scheme under Article 26 must be applied only to the extent necessary in order to attain its objective. [11]

24. Article 26(2) lays down a special system for calculating the taxable amount, which serves to simplify the recovery of input VAT paid by travel agents and tour operators in purchasing the services necessary for a holiday from third parties. It must be considered that the services supplied by such agents and operators are characterised by their usually being composed of services, in particular transport and accommodation, acquired from third parties and performed either inside or outside the Member State in which the undertaking is established or has a fixed establishment. [12]

25. Under the ordinary scheme of VAT, under Article 11A(1)(a) of the Sixth Directive, the taxable amount for most supplies of services is the *consideration* for the service supplied; it follows that, in order to recover the input tax on supplies of services acquired from other taxable persons for the organisation of the holiday, the operator would have to comply with the necessary administrative formalities, in particular the identification for VAT purposes in every Member State in which it has acquired those services. It is evident that that would render the normal conduct of the business of travel agents and tour operators difficult. By contrast, in the scheme under Article 26(2), the taxable amount for VAT is the trader's *profit margin*, that is, the difference between the

10 — See Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraphs 13 to 15; Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 33, and the Opinion of Advocate General Léger in that case, paragraph 27. It should however be noted that the operation of the special scheme laid down by Article 26 also meets the requirement of ensuring that the revenue from VAT is allocated to the Member State in which the final 'consumption' of the individual services which comprise the sole supply rendered to the traveller takes place, that is in which the traveller enjoys those services (see here the proposed amendment to the Sixth Directive concerning Article 26, cited above at footnote 2; see also Terra, B.J.M. and Kajus, J., *A Guide to European VAT Directives, Commentary on the Value Added Tax of the European Community*, IBFD, 2002, under Article 26, in particular at page 106.14). That objective is pursued by means of the particular method for calculating the taxable amount and of the determination of the place of taxation laid down by Article 26 (see footnote 13 below).

11 — *Madgett and Baldwin*, cited above, paragraph 34.

12 — *Van Ginkel*, cited above, paragraph 14. As Advocate General Gulmann noted in his Opinion in that case (at point 3), the special scheme under Article 26, even though it applies regardless of the fact that the business of travel agents (or of tour operators) is carried out in one or more Member States, is justified essentially in the light of the 'cross-border' elements of that business.

'total amount to be paid by the traveller' exclusive of VAT and the actual cost inclusive of VAT to the travel agent (or, in the present case, the tour operator) of the supplies of services acquired from other taxable persons. Since it is regarded as a cost component, the input tax is thus implicitly 'recovered' by the operator. [13]

26. However, whilst it is true that the different system for calculating the taxable amount in respect of VAT under the scheme under Article 26 is justified in the light of the objectives of that special scheme, I do not see why, in the context of that scheme, the concept 'total amount to be paid by the traveller' should have a meaning different to that of the concept of 'consideration' under the ordinary scheme. The fact that the method employed for calculating the taxable amount is not the same under the two schemes does not imply that the factors to be taken into consideration for that purpose are also different. Those concepts clearly both identify the same economic fact, namely the price paid to the supplier for the service provided, and should therefore have the same scope, unless a different interpretation is justified specifically in the light of the objectives pursued by Article 26.

27. The only argument advanced by First Choice in support of a more restrictive interpretation of the concept 'total amount to be paid by the traveller' as compared with that of 'consideration' is the special nature of the scheme under Article 26 as compared with the general rules of the Sixth Directive. However, as we have seen, that special nature cannot be extended beyond what is necessary in order to attain the objectives of that scheme and, I repeat, I do not see how an interpretation of the expression 'total amount to be paid by the traveller' in the light of the general rule under Article 11A(1)(a) would be contrary to those objectives.

28. Neither does the distinction made by First Choice, to the effect that the amounts paid by a third-party agent or representative of the traveller fall within 'the total amount to be paid by the traveller' whilst the sums paid by a third party which has no legal relationship with the traveller do not, seem to me to be well founded. As has been seen, under the scheme of Article 26 the expression 'total amount to be paid by the traveller' identifies nothing more than the price of the holiday, that is the consideration for the 'service... supplied by the travel agent to the traveller' within the meaning of that provision. What Article 26 takes into consideration is the economic and not the legal aspect of the mutual exchange of services (holiday/consideration) for the purpose of calculating the profit margin of the operator by means of the comparison between the price of the holiday and the costs borne by the tour operator to that end. But nothing permits

13 — Guaranteeing at the same time a correct allocation of the tax yield between the Member States. The VAT revenue from the services of which the holiday is made up is allocated to the Member States in which the traveller enjoys those services (since the trader does not recover it in those States), whilst the tax on the agent's profit is allocated, under the express wording of Article 26(2), to the Member State in which he is established (see above, footnote 10).

the conclusion that, in using the term 'traveller', the Community legislature intended to exclude from the calculation of the margin the amounts paid by way of consideration by third parties who are not recipients of the service, with the sole exception of third parties who act in the name of and on behalf of the traveller. Neither has First Choice put forward any convincing substantiation in that respect.

29. I would add that, as already pointed out, an interpretation that would bring within the concept 'total amount payable by the traveller' the amounts paid by third parties by way of consideration for the organisation of the holiday finds confirmation in the case-law of the Court, which, also on the subject of sales at discounted prices, applies the principle of 'subjective' value, according to which, for the purposes of calculating the taxable amount under the ordinary scheme laid down by Article 11A(1)(a) of the Sixth Directive, the consideration should be treated as everything that the supplier of goods or services has actually received in each specific case. [14]

30. I therefore consider that the expression 'total amount payable by the traveller' under Article 26(2) of the Sixth Directive covers the amounts paid by a third party to the tour operator by way of consideration for the holiday. [15]

31. In the light of the foregoing, it is necessary next to determine, as I have anticipated would be the case, whether the additional amount paid by the travel agent to the tour operator falls within the abovementioned concept, in the particular circumstances indicated by the referring court. In other words, it is necessary to ascertain whether that additional amount can be regarded as part of the consideration paid to the tour operator for the holiday.

32. First Choice submits, on that point, that the additional amount paid by the travel agent is in reality attributable to an economic operation different to that relating to the sale of the holiday. It claims that this amount constitutes the consideration for a service supplied by the tour operator to the travel agent, a service consisting in the facility provided to the agent to determine the selling price of the holiday as he sees fit. In support of that assertion, First Choice claims that the customer is ignorant of the arrangements existing between the agent and the operator; he is simply required to pay the reduced price of the holiday, benefiting specifically from that reduction and not from the payment of an additional amount to the operator by the

14 — Confining myself to the case-law cited by the participants in these proceedings, I would refer to Case C-288/94 *Argos Distributors* [1996] ECR I-5311 and Case C-317/94 *Elida Gibbs* [1996] ECR I-5339.

15 — I note, moreover, that the current proposed amendment to Article 26 is to the same effect, providing in particular for the substitution of the concept of 'total amount to be paid by the traveller' for that of 'sale price', on the model of Article 11A(1)(a).

travel agent. Since therefore the only relevant economic operation for the purposes of the application of Article 26 is precisely that relating to the sale of the holiday, First Choice contends that the additional amount paid by the agent escapes from the application of the special scheme laid down by that provision, remaining instead subject to taxation under the ordinary scheme. Consequently, even if the concept 'total amount to be paid by the traveller' under Article 26(2) had to be interpreted as including the sums paid to third parties by the tour operator by way of consideration for the holiday, the additional amount paid by the travel agent could not be brought within that concept.

33. For my part, all that I can say in that regard is that, in the light of the criteria elaborated by the settled case-law of the Court, in order to be able to regard the additional amount paid by the travel agent as part of the consideration for the service supplied by the tour operator, there must be a *direct link* between the payment of that amount and the supply of the service. In other words, that additional amount must be paid to the tour operator in order for him to arrange the holiday for the purchaser. [16] From the facts referred to in the question it seems that it must be inferred that that is specifically what happens: in particular, it seems to me to be significant that, in the hypothesis stated by the referring court, the tour operator is prepared to sell the holiday to the customer only on condition that he receives the full brochure price, and that furthermore he remunerates the travel agent on the basis of that price, and not on the basis of any reduced price paid by the customer. [17] Having said that, I consider that it is in any event for the referring court to ascertain, in the light of all the information available to it, whether those conditions are met in the particular circumstances of the case before it.

34. In conclusion, I believe that the question referred by the Court of Appeal should be resolved by replying that the concept 'total amount to be paid by the traveller' in Article 26(2) of the Sixth Directive covers all amounts received by the travel agent or tour operator by way of consideration for the holiday. It is for the referring court to ascertain, on the basis of the facts before it, whether the amount that, in the circumstances indicated by that court, a travel agent, acting as agent on behalf of a tour operator, has paid to the latter in addition to the price paid by the purchaser of a package holiday constitutes consideration of that kind.

16 — See Case 154/80 *Cooperatiëve Aardappelenbewaarplats* [1981] ECR 445, paragraph 12; Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 11 et seq.; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraphs 11 and 12; Case C-33/93 *Empire Stores* [1994] ECR I-2329, paragraph 12. See also, by analogy, Case C-184/00 *Office des Produits Wallons* [2001] ECR I-9115, paragraph 11 et seq. and Case C-353/00 *Keeping Newcastle Warm* [2002] ECR I-5419, paragraph 24 et seq.

17 — See in particular the conditions set out at paragraphs (c), (d) and (f) of the question.

V — Conclusion

35. In the light of the foregoing considerations, I therefore suggest that the Court replies in the following terms to the question referred by the Court of Appeal (England and Wales) (Civil Division) by order of 13 March 2001:

Article 26(2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the rules 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 the concept 'total amount to be paid by the traveller' contained in that provision covers all amounts received by way of consideration for the supply of the holiday by the travel agent or by the tour operator to which the special scheme laid down by that provision applies, regardless of whether those amounts are paid by the traveller himself or by third parties. It is for the national court to ascertain whether the amount that, in the circumstances indicated by that court, a travel agent, acting as agent on behalf of a tour operator, has paid to the latter in addition to the price paid by the purchaser of a package holiday constitutes consideration of that kind.