

JUDGMENT OF THE COURT (Third Chamber)

6 December 2007*

In Case C-401/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 26 September 2006,

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma, acting as Agent,

defendant,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2007,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities asks the Court to declare that, in failing to determine, in accordance with Article 9(2)(e) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of Value Added Tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive'), the

place where the services of an executor of a will are supplied when the services are performed for customers established outside the European Community or for taxable persons established within the Community but not in the same State as the supplier, the Federal Republic of Germany has failed to fulfil its obligations under that provision of the Sixth Directive.

Legal context

Community legislation

- 2 Under Article 2(1) of the Sixth Directive, the supply of services ‘effected for consideration within the territory of the country by a taxable person acting as such’ is to be subject to value added tax (‘VAT’).

- 3 Article 9(1) of the Sixth Directive provides that the ‘place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied ...’.

- 4 The third indent of Article 9(2)(e) of that directive states however that:

‘(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons

established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

- services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information.'

National legislation

- ⁵ Paragraph 3a of the Law relating to Turnover Tax (Umsatzsteuergesetz, 'the UStG') of 26 November 1979 (BGBl. 1979 I, p. 1953), as amended by the Law of 21 February 2005 (BGBl. 2005 I, p. 386), provides:

'1. A supply of services is effected in the place where the trader carries on his business, subject to Paragraphs 3b and 3f ...

...

3. Where the customer to whom one of the other services mentioned in subparagraph 4 is supplied is an undertaking, by way of exception to subparagraph 1, the service is deemed to be supplied in the place where the customer carries on his business ...

4. For the purposes of subparagraph 3, “other services” shall mean: ... other services as part of the business of a lawyer, ... , of a tax adviser ... and in particular the provision of legal, financial or technical advice.’

6 In that regard, the Bundesfinanzhof has stated, in a judgment of 5 June 2003 (V R 25/02, BStBl. 2003 II, p. 734), that an executor’s services fall under Paragraph 3a(1) of the UStG, whilst services which are specific to lawyers or tax advisers fall under Paragraph 3a(4)(3) of the UStG.

7 Title 6 of Section 3 of Book 5 of the German Civil Code (Bürgerliches Gesetzbuch, ‘the BGB’) concerns executors.

8 Under Paragraph 2221 of the BGB, an executor may request an appropriate remuneration for performing his task, provided that the testator has not decided otherwise.

Pre-litigation procedure

9 In its letter of formal notice of 12 April 2005, notified on 19 April 2005, the Commission stated that, in its opinion, the national tax provisions cited above are

incompatible with the third indent of Article 9(2)(e) of the Sixth Directive and asked the German authorities to submit their observations within two months of the notification. The Federal Republic of Germany replied, by letter of 21 June 2005, that an executor's services are not comparable to a lawyer's services and do not fall within the scope of the third indent of Article 9(2)(e) of the Sixth Directive.

- 10 The Commission, standing by its analysis, therefore sent a reasoned opinion, which was dated 13 December 2005 and notified on 19 December 2005, calling on the Federal Republic of Germany to comply with the opinion within two months from its notification. Following the Member State's refusal to comply with the opinion, the Commission decided to bring the present action.

The action

Arguments of the parties

- 11 The Commission considers it clear from the provisions of German law cited above, both from their interpretation by the national courts and their administrative application, that the supply of an executor's services is always deemed to be effected in the place where he carries on his business. The same is true where that business is carried on by lawyers, tax advisers or auditors. Such practice is contrary to the wording of Article 9(2)(e) of the Sixth Directive, which chooses the place of the customer of the services as the place of supply, where the customer is established outside the Community or in a State other than that of the supplier.

- 12 The Commission claims, first, that the case-law of the Court does not accord to Article 9(1) of the Sixth Directive, laying down the principle that the place of supply is to be determined in relation to the place of business of the supplier, any precedence over Article 9(2) of that directive. Consequently, since it is not an exception, Article 9(2)(e) is not to be construed narrowly (see Case C-108/00 *SPI* [2001] ECR I-2361, paragraph 17).
- 13 The Commission considers that the services carried out as an executor are to be included among those which are principally and habitually carried out by a lawyer. It is therefore necessary, in order to determine whether the activity of an executor falls under Article 9(1) or Article 9(2) of the Sixth Directive, to rely not on the name of the profession of the person who provides the services at issue, but on the actual nature of those services. The Commission states moreover that the professions mentioned in the third indent of Article 9(2)(e) of the Sixth Directive are only illustrations and that that provision seeks in actual fact to describe categories of services.
- 14 According to the Commission, the role of an executor is to defend the interests of a client, to represent that person and to manage the specific legal situations of third parties. That confirms the overlap between the activities of lawyers and executors, notwithstanding the fact that economic aspects are linked to the legal aspects in the execution of wills. Activity of an economic nature is also involved in a lawyer's normal business, and the administration of an estate is not unique in that respect.
- 15 According to the Commission, it is of little account that the services are provided to beneficiaries of a will as customers of the services, since the supply in question is effected in the light of the testator's wishes.

- 16 It states that the development of the legal profession leads to specialisations, including in Germany, and in particular in the field of inheritance law, where there are specialist inheritance lawyers ('Fachanwalt für Erbrecht'), and any specialisation presupposes practical experience in the area concerned and relevant theoretical knowledge.
- 17 In addition, the Commission states that the testator is not in any way required to choose a specialist, but must above all select a person whom he trusts, and that trust is a characteristic of relationships with both lawyers in general and executors in particular.
- 18 The Commission lastly indicates that, even if the Guidelines of the VAT Committee (53rd Meeting of 4 and 5 November 1997, Document XXI/97/1.658), according to which the place of supply of services involving the tracing of heirs is to be determined in accordance with Article 9(2)(e) of the Sixth Directive, are not binding, in this case they are an accurate reflection of the Community legislature's intention to make the tracing of heirs subject to that provision. It is appropriate, therefore, to be guided by the rules applicable to the tracing of heirs and to apply them to the activities of executors, irrespective of any practical difficulties which that method of determining the place of supply may entail.
- 19 The Federal Republic of Germany contends that the Court should dismiss the application and order the Commission to pay the costs in full.
- 20 It submits that an executor's services are not comparable to those which a lawyer normally carries out and also differ from the other services referred to in the third indent of Article 9(2)(e) of the Sixth Directive.

- 21 It maintains that any person with legal capacity may be appointed an executor. It states that an executor's activity depends on the testator's instructions and covers various situations. It concedes that carrying out the testator's wishes upon the disposal of the estate requires legal knowledge, which is why recourse is often had to a lawyer, but submits that this is not a question of giving advice.
- 22 The Federal Republic of Germany adds that it is clear from the judgment in Case C-145/96 *von Hoffmann* [1997] ECR I-4857 that only the services principally and habitually carried out as part of the professions referred to in the third indent of Article 9(2)(e) of the Sixth Directive fall within the scope of that provision. The same is not true of services carried out as an executor, since that person does not have a client to defend. It is a question of reconciling interests, not representing a party.
- 23 In addition, a lawyer's services or an executor's services, even if carried out by a lawyer, serve different purposes, which relate to law and legal advice in the first case, and economic interests and management in the second.
- 24 According to the Federal Republic of Germany, it is also necessary to take into account the objectives of the Sixth Directive. In that regard, it is appropriate, as far as possible, to tax the supply of services at the place where they are supplied or used and enjoyed, in accordance with the principle of the neutrality of VAT. Whilst it is possible to establish a connection as to place between a lawyer and his client, that connection is absent from the executor-beneficiary relationship, since the execution of a will has a link above all with the place where the estate is situated. In addition, difficulties are to be expected in the case of the management of immovable property, because, under Article 9(2)(a) of the Sixth Directive, the place of taxation must then be that where the property is situated. The fact that the beneficiaries may

be located in different Member States and outside the Community also poses a problem in that respect.

25 The Federal Republic of Germany submits finally that 'similar services' within the meaning of the third indent of Article 9(2)(e) of the Sixth Directive are also not concerned. In particular, it rejects any comparison with the activities of a researcher tracing heirs.

Findings of the Court

26 It is appropriate, at the outset, to make the following remarks.

27 First, according to settled case-law, in proceedings for failure to fulfil obligations pursuant to Article 226 EC, it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission which must provide the Court with the evidence necessary for the Court to establish that the obligation has not been fulfilled, and it may not rely on any presumption (Case 62/89 *Commission v France* [1990] ECR I-925, paragraph 37, and Case C-341/02 *Commission v Germany* [2005] ECR I-2733, paragraph 35).

28 Secondly, in this case, the action for failure to fulfil obligations can refer only to the situation where, first, the supply of services by the executor is effected for consideration, as Paragraph 2221 of the BGB permits, and, secondly, that service is supplied by a taxable person acting as such, within the meaning of Article 2(1) of the Sixth Directive, failing which the supply at issue cannot be subject to VAT.

- 29 Thirdly, as regards the relationship between Article 9(1) and Article 9(2) of the Sixth Directive, the Court has repeatedly held that Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) lays down the general rule on the matter. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, secondly, non-taxation (see, *inter alia*, Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20; and *SPI*, paragraph 15).
- 30 Consequently, when interpreting Article 9 of the Sixth Directive, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2). If not, it falls within the scope of Article 9(1) (see, *inter alia*, *Dudda*, paragraph 21, and *SPI*, paragraph 16).
- 31 In that regard, it must be stated that the third indent of Article 9(2)(e) of the Sixth Directive refers not to professions, such as those of lawyers, consultants, accountants or engineers, but to services. The Community legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers (see *von Hoffmann*, paragraph 15). The expression 'other similar services' refers not to some common feature of the disparate activities mentioned in the third indent of Article 9(2)(e) of the Sixth Directive but to services similar to those of each of those activities, viewed separately. A service must thus be regarded as similar to those of one of the activities mentioned in that provision when they both serve the same purpose (see, to that effect, Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraphs 19 to 22, and *von Hoffmann*, paragraphs 20 and 21).

- 32 It is in the light of those considerations that this action for failure to fulfil obligations must be considered.
- 33 In the present case, the Commission criticises the Federal Republic of Germany for considering, in its legislation, that the service of executing a will falls under Article 9(1) of the Sixth Directive, whilst, according to the Commission, either as a service principally and habitually provided by a lawyer or as a service which is similar to those which are part of a lawyer's business, it falls within the scope of Article 9(2) of the Sixth Directive.
- 34 Accordingly, it is appropriate, first, to determine whether an executor's services are among the services principally and habitually carried out as part of a lawyer's profession.
- 35 The service of executing a will arises from the testator's wish to see one or more persons implement the provisions of his will. The BGB provides that the executor can be chosen directly by the testator or by a third party whom the testator will have designated or, in certain cases, by the Nachlassgericht (court with jurisdiction in matters of succession). The transactions which he carries out vary in nature and length according to the instructions he receives.
- 36 As for services principally and habitually carried out as part of a lawyer's profession, the Court has stated that they are those of representing or defending the interests of a person (*von Hoffmann*, paragraph 17).

- 37 Although lawyers are, particularly in Germany, often chosen to be executors, because of their legal knowledge and the fact that such knowledge is necessary in all inheritance cases, the fact remains that the executor does not represent the testator, but merely carries out his last wishes, remaining neutral vis-à-vis those who benefit from the execution of the will. Strictly speaking he does not defend the testator's interests, but puts into effect wishes which have crystallised and which he interprets, whereas in a lawyer-client relationship, the lawyer's task is to serve the best interests of his client, as a general rule in the context of a dispute where there are conflicting interests. It follows that the service of executing a will is of a specific nature which distinguishes it from the services principally and habitually carried out by a lawyer.
- 38 It is necessary, next, to verify whether an executor's services can be regarded as comparable to a lawyer's services for the purposes of the third indent of Article 9(2)(e) of the Sixth Directive.
- 39 The considerable variety of tasks which can be carried out by an executor, ranging from the management of an estate to the protection of non-material interests, including the simple distribution of sums of money or moveable or immoveable property, makes it difficult to identify what is a standard service in respect of executing a will. The task of an executor is, in fact, to carry out the testator's wishes, which may involve management activities, legal acts and a whole range of factual or legal transactions. However, the service of executing a will more generally involves, as the Federal Republic of Germany rightly states, economic activity, since, in the majority of cases, executors value and distribute the testator's estate for the benefit of the recipients of their services and sometimes, especially in connection with the management of the property of minors, they protect and ensure a return on that estate. Conversely, even though economic considerations are naturally not unrelated to a lawyer's activities, the services carried out by a lawyer seek primarily to ensure that a claim of a legal nature succeeds. Those two services do not therefore serve the same purpose.

- 40 In those circumstances, an executor's services cannot be considered to be similar to a lawyer's services.
- 41 It must therefore be concluded that the service of executing a will constitutes neither a service principally and habitually carried out by a lawyer nor a service which is similar to those carried out by a lawyer.
- 42 The Court must accordingly find that the Commission has failed to establish that, by maintaining legislation under which the place where an executor's services are supplied must be determined as the place where the supplier carries on his business, the Federal Republic of Germany has infringed the provisions of the Sixth Directive.
- 43 Therefore, the Court must dismiss this action for failure to fulfil obligations.

Costs

- 44 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay, in addition to its own costs, those of the Federal Republic of Germany.

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

- 1. Dismisses the action.**

- 2. Orders the Commission of the European Communities to pay, in addition to its own costs, those of the Federal Republic of Germany.**

[Signatures]