JUDGMENT OF THE COURT (Second Chamber)
4 July 1985 *

In Case 168/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Hamburg, for a preliminary ruling in the proceedings pending before that court between

Gunter Berkholz, sole proprietor of the undertaking abe-Werbung Alfred Berkholz, whose registered office is in Hamburg,

and

Finanzamt [Tax Office] **Hamburg-Mitte-Altstadt,**

on the interpretation of Article 9 (1) and Article 15 (8) 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,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

the Government of the French Republic, by Jean-Claude Antonetti, an official in the General Secretariat of the Comité interministériel pour les questions de coopération economique européenne [Interministerial Committee for questions of European economic cooperation], in the course of the written procedure,

the Government of the Kingdom of Denmark, by Laurids Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs, in the course of the oral procedure,

the Commission of the European Communities, by its Legal Adviser, Friedrich-Wilhelm Albrecht, in the course of the written and the oral procedures,

after hearing the Opinion of the Advocate General delivered at the sitting on 6 June 1985,

gives the following

* Language of the Case: German.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 30 April 1984, which was received at the Court on 2 July 1984, the Finanzgericht Hamburg referred questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 9 (1) and Article 15 (8) 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 (Official Journal 1977, L 145, p. 1).

The background to the case

2 It appears from the order for reference that the activities of the applicant in the main proceedings, the undertaking abe-Werbung Alfred Berkholz, whose registered office is in Hamburg, include the installation and operation of gaming machines, juke boxes and the like. It operates most of its machines in public houses in Schleswig-Holstein and Hamburg but has also installed some gaming machines on board two ferryboats owned by the Deutsche Bundesbahn [Federal German Railways] which ply between Puttgarden on the German island of Fehmarn and Rodbyhavn (Denmark). Those machines are maintained, repaired and replaced at regular intervals by employees of abe-Werbung, who settle accounts with the Deutsche Bundesbahn *in situ*. Although those employees spend a proportion of their working hours in carrying out those operations, the applicant does not maintain a permanent staff on the ferryboats.

3 The German tax authorities consider that approximately 10% of the turnover generated by the gaming machines arises when the vessels are in the German port, 25% during the passage through German territorial waters and the remainder on the high seas, in Danish territorial waters or in the Danish port. The Finanzamt charged tax on the entire turnover generated in 1980 by abe-Werbung on the two ferries, deeming it to have arisen at abe-Werbung's place of business in Hamburg and hence in the German collection area in accordance with Paragraph 3 (a) (1) of the Umsatzsteuergesetz [Law on turnover tax] 1980, which was introduced pursuant to Article 9 (1) of the Sixth Directive. The Finanzamt further considers

that the conditions laid down for the grant of tax exemption in Paragraph 4 (2) read in conjunction with Paragraph 8 (1) (5) of the Umsatzsteuergesetz 1980, which correspond to Article 15 (8) of the Sixth Directive, are not fulfilled, on the ground that the turnover generated by the gaming machines was not generated in meeting the direct needs of sea-going vessels.

4 The applicant in the main proceedings considers that the services in question were provided from a 'Betriebstätte' [business establishment] within the meaning of the second sentence of Paragraph 3 (a) (1) of the Umsatzsteuergesetz 1980 or from a 'fixed establishment' within the meaning of Article 9 (1) of the Sixth Directive, located on board the ferries. It therefore regards only 10%, or at the most a further 25%, of the turnover generated by the gaming machines on board the ships as chargeable to German turnover tax. It also takes the view that in any event the entire turnover generated by the machines on board the ships is exempt from turnover tax under Paragraph 4 (2) in conjunction with Paragraph 8 (1) (5) of the Umsatzsteuergesetz 1980 (corresponding to Article 15 (8) of the Sixth Directive), since the machines serve the direct needs of sea-going vessels inasmuch as they satisfied the needs of the ferries, more particularly the entertainment needs of the passengers.

5 The Finanzgericht considers that Article 9 of the Sixth Directive is designed to lay down a clear and straightforward basic principle for the determination of the State in which services subject to value-added tax are deemed to be supplied. It appears from the seventh recital in the preamble to the Sixth Directive that Article 9 is intended, through the harmonization of the relevant national legislation, to eliminate conflicts concerning jurisdiction as between Member States and make for a fairer distribution of the financial burdens between the Member States while, at the same time, taking account of the fact that a proportion of national value-added tax revenues constitutes an essential element of the Communities' own resources.

6 In the Finanzgericht's view, the services in question do not fall within any of the exceptions provided for in Article 9 (2) of the Sixth Directive, and so they must be dealt with in accordance with the general rule laid down in Article 9 (1), which provides that the place where a service is supplied is to be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied. In that connection, the Finanzgericht discusses whether the juxtaposition of the terms 'place where a supplier has established his business' and 'fixed establishment' might possibly denote a difference of meaning, that is to say whether the criteria for the existence of a fixed establishment might be different and less stringent as regards staff and material aspects.

7 In that context the Finanzgericht indicates the difficulties that arise in determining the territorial scope of national tax law as regards, in the first place, identical

services performed in the same circumstances on the territory of another Member State and, secondly, the taxation of services supplied on board vessels on the high seas, especially vessels far removed from the national territory.

8 The Finanzgericht considers that the interpretation of the directive is of critical importance with a view to ensuring that the provisions of the national legislation are implemented consonantly with the provisions of the directive. In its view, this is also true of the interpretation of the list of exemptions set out in Article 15 of the Sixth Directive and reiterated in Paragraphs 4 and 8 of the Umsatzsteuergesetz 1980 having regard to the eleventh recital in the preamble to the Sixth Directive, which states that 'a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States'.

9 Accordingly the Finanzgericht referred the following two questions to the Court for a preliminary ruling:

(1) Must Article 9 (1) of the Sixth Council Directive, of 17 May 1977, on the harmonization of the laws of the Member States relating to turnover taxes (77/388/EEC) be interpreted as meaning that the term 'fixed establishment' also covers facilities for conducting a business (such as, for example, the operation of gaming machines) on board a ship sailing on the high seas outside the national territory? If so, what are the relevant criteria for the existence of a 'fixed establishment'?

(2) Must Article 15 (8) of the Sixth Directive be interpreted as meaning that services to meet the direct needs of sea-going vessels cover only those necessarily connected with maritime shipping or do they also include other services which are provided on board ships but are no different from corresponding services provided on land, such as, for example, the operation of gaming machines?

Observations submitted to the Court

10 Observations have been submitted to the Court by the Government of the Kingdom of Denmark, the Government of the French Republic and the Commission.

11 The Danish Government points out that the taxation of services supplied on board sea-going vessels raises problems as regards determining the geographical and personal scope of the Sixth Directive. It considers that, in any event, it cannot be argued that a Member State may tax services supplied on board ship only in so far as the ship in question is within that State's territorial jurisdiction. Article 3 of the directive determines the territorial field of application of the directive by reference to Article 227 of the EEC Treaty, which does not contain a precise definition of territorial and personal scope. As a result, it is for each Member State to determine the territorial application of its legislation in accordance with the rules of international law. The scope of the directive itself is coterminous with those limits. Hence there is nothing to prevent Member States from applying their tax legislation on ships flying the national flag which are outside their territorial jurisdiction. Even where a vessel is in the territorial waters of another State there is nothing in international law to prevent the State whose flag is being flown by the vessel from applying its law to transactions on board, although, of course, such provisions cannot be enforced until the vessel has left the sovereign territory of the other State. Accordingly, the State whose flag the vessel is flying is not precluded from applying its own tax laws even when the vessel is outside its sovereign territory. In that regard, each State must adopt the fiscal policy which it regards as reasonable. In the Danish Government's view, any tax conflicts which may arise as a result of the application of those concepts can be easily resolved by cooperation between the States concerned. In point of fact, difficulties have never arisen between Denmark and the Federal Republic of Germany in that regard; as far as the crossing in question is concerned, the Danish authorities assume jurisdiction over the Danish ferryboats and the German authorities over the German vessels. As regards the Finanzgericht's second question, the Danish Government expresses the view that the category, referred to in Article 15 (8) of the Sixth Directive, of services to meet the direct needs of sea-going vessels does not include the operation of gaming machines.

12 The French Government's observations relate exclusively to the interpretation of the relevant provisions of the Sixth Directive. The French Government considers that a 'fixed establishment' within the meaning of Article 9 (1) of the Sixth Directive may cover any centre of activity where a person liable to value-added tax regularly carries out operations falling within the scope of that tax. It therefore considers that the installation on board vessels sailing the high seas of automatic gaming or other machines which are, *inter alia*, maintained, repaired and replaced *in situ* on a permanent basis by the operator's staff constitutes a fixed establishment within the meaning of the said Article 9 (1). As for the Finanzgericht's second question, the French Government further considers that the exemption provided for in Article 15 (8) of the Sixth Directive does not apply to the operation of gaming machines on board ships.

13 The Commission contends that, within Article 9 of the Sixth Directive, the concept of a fixed establishment is placed on an equal footing with the place where the supplier has established his business. It considers that in view of the proliferation of automatic devices capable of providing services without the need for human operators to be present it ought, in principle, to be possible to view such machines as a fixed establishment within the meaning of Article 9 of the Sixth Directive. The Commission considers that that approach would result in a rational distribution of taxation powers in accordance with the general principle underlying legislation on turnover tax, inasmuch as goods or services ought to be taxed in the State where they are consumed. The Commission argues that it follows that services provided by such machines — by the same token, moreover, as other services provided on the high seas by persons — should be exempt from all taxation. As for the interpretation of Article 15 (8) of the Sixth Directive, the Commission considers that the operation of gaming machines cannot be considered a service to meet the direct needs of sea-going vessels within the meaning of that provision.

The concept of a fixed establishment within the meaning of Article 9 of the Sixth Directive (Question 1)

14 The Finanzgericht's first question must be answered in the light of the objective pursued by Article 9 within the context of the general scheme of the Sixth Directive. As the seventh recital in the preamble implies, Article 9 is designed to secure the rational delimitation of the respective areas covered by national value-added tax rules by determining in a uniform manner the place where services are deemed to be provided for tax purposes. Article 9 (2) sets out a number of specific instances of places where certain services are deemed to be supplied, whilst 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, as Article 9 (3) indicates, albeit only as regards specific situations.

15 Article 9 (1) reads as follows:

'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 or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides'.

16 Since this case concerns services supplied on board sea-going ships, it is appropriate first of all to determine the territorial scope of the directive. In accordance with the principle laid down in Article 3 of the directive, which provides that the "'territory of the country" shall be the area of application of the Treaty establishing the European Economic Community as stipulated in respect of each Member State in Article 227', the territorial scope of the directive coincides, in the case of each Member State, with the scope of its value-added tax legislation. As the Danish Government correctly contends, Article 9 does not restrict the Member States' freedom to tax services provided outside their territorial jurisdiction on board sea-going ships over which they have jurisdiction. Contrary to the view of the applicant in the main proceedings, supported by the Commission, the Sixth Directive by no means requires services supplied on the high seas, or, more generally, outside the sovereign territory of the State having jurisdiction over the vessel, to be exempted from tax irrespective of the place where those services are deemed to be supplied — the place where the supplier has established his business or some other fixed establishment.

17 Equally, it is for the tax authorities in each Member State to determine from the range of options set forth in the directive which point of reference is most appropriate to determine tax jurisdiction over 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.

18 It appears from the context of the concepts employed in Article 9 and from its aim, as stated above, that 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. It does not appear that the installation on board a sea-going ship of gaming machines, which are maintained intermittently, is capable of constituting such an establishment, especially if tax may appropriately be charged at the place where the operator of the machines has his permanent business establishment.

19 The Finanzgericht's first question should therefore be answered as follows: Article 9 (1) of the Sixth Council Directive of 17 May 1977 must be interpreted as meaning that an installation for carrying on a commercial activity, such as the operation of gaming machines, on board a ship sailing on the high seas outside the national territory may be regarded as a fixed establishment within the meaning of that provision only if the establishment entails the permanent presence of both the human and technical resources necessary for the provision of those services and it is not appropriate to deem those services to have been provided at the place where the supplier has established his business.

The interpretation of Article 15 (8) of the Sixth Directive (Question 2)

20 Article 15 of the directive provides that 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 evasion, avoidance or abuse: ...4. the supply of goods for the . . . provisioning of vessels [*inter alia*] used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities . . . ; 5. the supply, modification, repair, maintenance, chartering and hiring of ... sea-going vessels . . . ; 8. the supply of services other than those referred to in paragraph 5, to meet the direct needs of the sea-going vessels referred to in that paragraph or of their cargoes'.

21 It appears from all of the provisions cited that the only services exempted under Article 15 (8) are those which are directly connected with the needs of sea-going vessels or their cargoes, that is to say services necessary for the operation of such vessels. The installation of gaming machines whose object is to entertain passengers and which themselves have no intrinsic connection with navigational requirements cannot be classed as such.

22 Therefore the Finanzgericht's second question should be answered as follows: Article 15 (8) of the Sixth Directive must be interpreted as meaning that the exemption for which it provides does not apply to the operation of gaming machines installed on board the sea-going vessels referred to in that article.

Costs

23 The costs incurred by the Government of the Kingdom of Denmark, the Government of the French Republic, the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Finanzgericht Hamburg by order of 30 April 1984, hereby rules:

(1) Article 9 (1) of the Sixth Council Directive, 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 must be interpreted as meaning that an installation for carrying on a commercial activity, such as the operation of gaming machines, on board a ship sailing on the high seas outside the national territory may be regarded as a fixed establishment within the meaning of that provision only if the establishment entails the permanent presence of both the human and technical resources necessary for the provision of those services and it is not appropriate to deem those services to have been provided at the place where the supplier has established his business.

(2) Article 15 (8) of the Sixth Directive must be interpreted as meaning that the exemption for which it provides does not apply to the operation of gaming machines installed on board the sea-going vessels referred to in that article.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 4 July 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber