1. The territorial scope of the Sixth Directive, Directive 77/388, on the harmonization of the laws of the Member States relating to turnover taxes coincides, in the case of each Member State, with the scope of its value-added-tax legislation. Hence, Article 9 of the directive, concerning the place where a service is deemed to be supplied, does not prevent the Member States from taxing services provided outside their territorial jurisdiction on board sea-going ships over which they have jurisdiction.

2. In order to determine the point of reference for tax purposes for the provision of services it is for each Member State to determine from the range of options set forth in Directive 77/388 which point of reference is most appropriate from the point of view of tax. According to Article 9 (1) of the directive, 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.

3. Article 9 (1) of Directive 77/388, on the place where a service is deemed to be supplied for tax purposes, 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.

4. Article 15 (8) of Directive 77/388, on the exemption of services to meet the direct needs of sea-going vessels, must be interpreted as meaning that the exemption for which it provides does not apply to the operation of gaming machines installed on board sea-going vessels.

OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 6 June 1985 *

Mr President,
Members of the Court,

1. The Finanzgericht [Finance Court] Hamburg, has made a reference to the Court 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 —

* Translated from the Italian

Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1) in connection with a case concerning the liability to value-added tax of earnings made by a German undertaking which operates gaming machines on ferry boats plying between the Federal Republic of Germany and Denmark. In particular, the Finanzgericht asks the Court to interpret the term 'fixed establishment' used in the provision defining the place where a service is provided and the exemption provided for in respect of services to meet the 'direct needs of sea-going vessels'.

The undertaking abe-Werbung of Hamburg, which is owned by Gunter Berkholz, is an advertising agency but also installs and operates gaming machines, that is to say, machines which either retain the stake inserted by the gambler or, if he wins, return it together with his winnings. In late 1980 abe-Werbung was operating 66 gaming machines, 55 on land (Schleswig-Holstein and Hamburg) and 11 on two ferry boats of the Deutsche Bundesbahn making the crossing between Puttgarden in Germany and Rodbyhavn in Denmark. In 1980 the Bundesbahn received 62% of abe-Werbung's takings as consideration for authorizing the installation and operation of the machines.

For two days a week abe-Werbung regularly employs two workers on the ferries (a) to keep in good order, repair and replace the machines and (b) to empty them and, together with staff of the Bundesbahn, to count the takings. The firm does not have premises of its own on board, although it may keep the machine used to count the takings in the captain's quarters, store spare parts, entire machines and security keys under cover and occasionally deposit the takings in the vessel's safe.

In 1980 abe-Werbung's operation of its 66 machines earned it about DM 636 000, of which DM 346 701.20 came from machines installed on the ferry boats. Ten percent of the latter sum arose within the territorial jurisdiction of the German tax authorities (within the meaning of the first sentence of Paragraph 1 (2) of the Umsatzsteuergesetz [Law on turnover tax], that is to say when the vessels were in the port of Puttgarden. A further 25% arose as a result of the use of the machines outside German customs territory but within German territorial waters (first sentence of Paragraph 1 (3) of the Umsatzsteuergesetz).

The Finanzamt [Tax office] Hamburg-Mitte-Altstadt has charged turnover tax on the entire proceeds of the machines installed on the ferries on the grounds that (a) according to Paragraph 3 (a) (1) of the Umsatzsteuergesetz, which implements Article 9 (1) of the Sixth Directive, turnover is deemed to have been generated at the undertaking's principal place of business, which in the case of abe-Werbung is in Germany, and (b) the requirements for granting the exemption provided for in Paragraph 4 (2) read together with Paragraph 8 (1) (5) of the Umsatzsteuergesetz (Article 15 (8) of the Sixth Directive) were not fulfilled, since the services provided by the gaming machines do not meet the direct needs of the vessels.

For its part, abe-Werbung contends (a) that the services in question are provided from a 'Betriebstätte' [business establishment] within the meaning of the second sentence of Paragraph 3 (a) (1) of the Umsatzsteuergesetz or from a 'fixed establishment' within the meaning of Article 9 (1) of the Sixth Directive, located aboard the ship in question; accordingly it argues that only the proceeds generated within the territorial jurisdiction of the German tax authorities are subject to turnover tax; and (b) that by satisfying the passengers' entertainment needs the services meet the direct needs of the vessels and hence should be exempted from the tax.

In the course of an action brought by abe-Werbung, the Seventh Senate of the Finanzgericht Hamburg, by an order of 30 April 1984, stayed the proceedings and referred the following questions to the Court under Article 177 of the EEC Treaty:

(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?

The French Government and the Commission of the European Communities submitted written observations to the Court; the Danish and German Governments presented only oral observations.

2. Question 1 seeks to establish the place where transactions are to be deemed to have taken place for tax purposes where the services in question were provided by gaming machines on ships plying between the territories of two Member States.

The relevant rule is, I repeat, set out in Article 9 of the Sixth Directive. Article 9 (1) 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 or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.' However, Article 9 (2) provides for several exceptions. As a result, the place of supply of services relating to 'cultural, artistic, sporting, scientific, educational, entertainment or similar activities' including the supply of ancillary services (first indent of Article 9 (2) (c)) or to 'ancillary transport activities such as loading, unloading, handling and similar activities' (second indent of Article 9 (2) (c)), is deemed to be the place where those services are physically carried out.

As is stated in the order for reference and in the Commission's observations, the services at issue do not fall within those exceptions. They cannot be covered by the first indent of Article 9 (2) (c) owing to their 'itinerant' character or by the second indent of that provision because they have nothing to do with the loading, unloading or handling of the ships. All that remains is the general rule laid down in Article 9 (1). As we have already seen, that provision contains two main criteria and one subsidiary one. The first are based on the *place where the supplier has established his business* or where he has a *fixed establishment* from which he organizes the service. The third criterion, which operates only when the other two do not apply, is the place where the supplier has his permanent address or usually resides.

The concept of the 'place where the supplier has established his business' is not the subject of the order for reference and, in

any event, does not raise problems. I shall therefore merely observe that it should be understood in its technical sense of the registered office, as indicated by the statutes of the company owning the supplier undertaking. The concept of 'fixed establishment' is more complex. I shall start by saying that 'fixed' is equivalent to 'lasting' or 'continuous' and is the opposite of 'temporary' or 'occasional'. But that does not suffice. A business establishment, particularly where it provides services over a period of time, presupposes a certain degree of organization. And there is no organization — an ordered structure comprising things and persons — which does not imply some division of labour. As a result, a supplier of services has to have both physical means and staff to help him exploit and operate those physical means.

Therewith the court making the reference has the interpretation which it has requested: a fixed establishment within the meaning of Article 9 (1) may well be an installation (such as a gaming machine), but only if it is permanently installed in a particular place and its operation requires human energy.

A final question: on which of the two main criteria laid down in Article 9 (1) must one rely when, as here, the place where the supplier has established his business does not coincide with the supplier's fixed establishment? The provision is silent in that regard; nor does the preamble to the directive provide any assistance since the seventh recital uses the term 'principal place of business' but in all evidence not as a term of art. I therefore propose to rely on the general principle that value-added tax should be charged at the place of consumption and hence give preference to the criterion which enables the supply of services to be located more accurately. There is no doubt that the more appropriate of the two for that purpose is the criterion of the 'fixed establishment' which is clearly more precise.

That finding is of general application but it is particularly useful in this case where the business activity is carried out in areas that fall within the geographical scope of two different tax systems rather than in one country only. The activity in question must therefore be located on the ship and, irrespective of the State in which the undertaking's principal place of business is situated, will be subject to the law of the State of the ship.

3. I shall add a few words on the second question, concerning the possible exemption of the services at issue. The applicant in the main proceedings considers that the exemption should apply. The argument is that the passengers and crew of ships, in particular of ferry boats, need to be entertained; the gaming machines satisfy that need and so can be said to be intended, as Article 15 (8) of the Sixth Directive states, to 'meet the direct needs of the sea-going vessels . . . or of their cargoes'.

I am not a moralist; indeed I hold that there is more than a grain of truth in De Maistre's well-known paradox 'l'effet principal du jeu, et qui le met au rang des institutions les plus précieuses, c'est qu'il force les hommes à se regarder' [the principal effect of gaming, which makes it one of the most valuable institutions, is that it compels men to look at themselves]. In brief, I personally would have no compunction in adopting abe-Werbung's argument. However, I am bound to admit, as the Commission and the Danish and French Governments point out, that the only needs which can be said to be *direct* needs of the vessels are those relating to

navigation, and hence the only services qualifying for exemption are those needed for operations such as piloting, towing, the use of port facilities, unloading of goods and so forth. The entertainment of the passengers — who, moreover, are not part of the 'cargo' — deserves every attention but is in no way comparable.

4. On all the above grounds I propose that the Court should answer the questions raised by the Seventh Senate of the Finanzgericht Hamburg, by order of 30 April 1984, in the case of Gunter Berkholz, proprietor of the undertaking abe-Werbung, and Finanzamt Hamburg-Mitte-Altstadt in the following terms:

(1) Article 9 (1) of the Sixth Council Directive (77/388/EEC), of 17 May 1977, should be interpreted as meaning that the term 'fixed establishment' includes, *inter alia*, an installation (such as a gaming machine), provided that it is permanently installed in a specific place and requires for its operation the employment of personnel;

(2) Article 15 (8) of the Sixth Directive should be interpreted as meaning that only services which are necessarily connected with navigation are intended to meet the direct needs of the vessel or its crew.