OPINION OF ADVOCATE GENERAL COSMAS

delivered on 1 February 1996 *

1. In this case the Court has been asked to interpret 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 [1] (hereinafter 'the Sixth Directive'), in particular Articles 5, 6, 8 and 9 thereof.

I — The dispute

2. The appellant in the main proceedings, Faaborg-Gelting Linien A/S (hereinafter 'FG-Linien'), whose registered office is at Faaborg, Denmark, is a company incorporated under Danish law which operates a ferry running a scheduled service between Gelting in Germany and Faaborg in Denmark. During the crossing, food and drink for consumption on the spot are provided to passengers. FG-Linien did not include its receipts from the provision of food and drink on board the ferry in its turnover tax declarations for the financial years 1984 to 1989.

3. FG-Linien submits that the aforementioned supply of drinks and meals to ferry passengers should be categorized as a supply of services, and that consequently, under Paragraph 3(a)(1) of the Umsatzsteuergesetz 1980 (German Law on Turnover Tax, hereinafter 'the UStG') transposing Article 9 of the Sixth Directive, the place of supply of the services concerned should be deemed to be the place at which the company has established its business, namely Denmark. The German tax authorities charged turnover tax on the receipts from the aforementioned supply of meals and drinks on the ground that, under the UStG (first sentence of Paragraph 1(1)(1), Paragraph 1(3)(1) and Paragraph 3(1) and (6)), the supply of food and drink to passengers is a supply of goods, which is taxable at the place where it is carried out. FG-Linien brought a complaint and an action against the imposition of VAT, both of which were dismissed. Thereupon, FG-Linien appealed to the Bundesfinanzhof, which considered that it was necessary to make a reference to the Court for a preliminary ruling under Article 177 of the EC Treaty.

* Original language: Greek.

1 — OJ 1977 L 145, p. 1.

II — Preliminary questions

4. By order of 3 May 1994, [2] the Fifth Senate of the Bundesfinanzhof asked the Court to give a preliminary ruling on the following questions:

'1. What rules does the Sixth Directive 77/388/EEC contain for the taxation of transactions for the supply of foods for consumption on the spot (restaurant transactions)?

2. If there are no such rules, what rules of Community law apply to restaurant transactions on board means of transport plying between Member States with differing national rules on the place of taxation of such transactions?

3. If there are no such rules of Community law, can individual Member States maintain their differing rules on restaurant transactions or on the place of supply of such transactions, if those Member States by agreement avoid double taxation of the transactions in the individual case?'

5. As far as these questions are concerned, it should first be noted that the aforementioned transactions carried out on a ferry are covered by the provisions of the Sixth Directive. There is a precedent to this effect. In an earlier case, the Court has already had occasion to deal with questions raised by the application of the Sixth Directive to activities carried out on board a ship plying between two Member States. [3] Consequently, as the Commission and all the Member States which intervened in the proceedings — the Federal Republic of Germany, the Kingdom of the Netherlands and the Italian Republic — have emphasized in their observations, the second and third questions are to no purpose, since they are based on the idea that such activities do not fall within the scope of the relevant Community provisions. It follows that those questions do not need to be answered. As far as the first question is concerned, it appears from the grounds of the order for reference that the proceedings essentially raise questions relating to the interpretation of Articles 5, 6, 8 and 9 of the directive. More specifically, the first, main question is how the activity in question is to be classed. The second question is that of the determination of the place where the taxable transaction in question is to be deemed to have been carried out, that is to say, the place of supply of the food and drink.

2 — OJ 1994 C 288, p. 2.

3 — Case 168/84 *Berkholz* [1985] ECR 2251, which was concerned with the operation of gaming machines installed on ferries running scheduled services between German and Danish ports.

6. It should further be noted that, in connection with this case, the Court asked the German Government and the Commission, by letters dated 3 October 1995, questions relating to the registration of the ferry operated by FG-Linien and the geographical scope of the UStG. From their answers, it appears that: (a) the ferry is registered at the port of Faaborg in Denmark and (b) international waters and territorial waters do not in principle fall within the geographical scope of the UStG. Nevertheless, commercial transactions carried out in territorial waters for end-consumers are deemed to be transactions carried out within the jurisdiction to which the UStG applies and are therefore subject to value added tax.

III — Relevant legislation and case-law

7. With a view to establishing a common system of VAT within the Community, the Sixth Directive requires Member States to bring their national VAT systems into line with the common rules which it lays down. Those rules relate, *inter alia*, to the determination of the place where taxable transactions are deemed to be effected, which, according to the seventh recital in the preamble to the directive, is essential in order to avoid conflicts concerning jurisdiction as between Member States.

8. Thus, Article 2(1) of the Sixth Directive requires Member States to subject to VAT 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'. Article 3(1) provides that 'for the purposes of this Directive, 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'. As the Court held in *Berkholz*, 'the territorial scope of the directive coincides, in the case of each Member State, with the scope of its value added tax legislation'. [4] Articles 5 and 6 define the expressions 'supply of goods' and 'supply of services'. Article 5(1) states that '"supply of goods" means the transfer of the right to dispose of tangible property as owner'. The expression 'supply of services' is defined in Article 6 of the directive, which provides that '"supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5'.

9. Articles 8 and 9 contain provisions determining the place of supply of taxable transactions. Article 8 provides that the place of supply of goods is deemed to be the place where the goods are when the supply takes place. As far as supplies of services are concerned, according to Article 9(1) of the Sixth Directive, the place of supply is deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or,

4 — *Berkholz*, paragraph 16.

in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides. Thus, the rule is that the VAT legislation of the Member State with which the provider of services has a close geographical link is to be applied to a supply of services. In view of the foregoing, in order to define that link, that provision employs two primary points of reference and one alternative one.

10. The Court has held as regards that provision that, 'in order to avoid conflicts of jurisdiction in cases where the supply of services is covered by the laws of more than one Member State, Article 9(1), by way of derogation from the strict principle of territoriality, lays down the general rule that the service is deemed to be supplied at the place where the supplier has established his business or has a fixed establishment from which the service is supplied'. [5]

11. Interpreting the same provision, the Court held in *Berkholz* that, for a particular supply of services, the primary point of reference for tax purposes is 'the place where the supplier has established his business ... 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'. [6] In the same judgment, the Court held that 'it appears from the context of the concepts employed in Article 9 and from its aim ... 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'. [7] Consequently, Article 9(1) identifies, as far as provisions of services are concerned, the place of supply and, consequently, the place of taxation with the place where the company supplying the services has established its business. According to the case-law cited above, that place is regarded as being the most useful point of reference for tax purposes. This means that, according to the provision in question, the tax law applicable to a supply of services is principally that of the place where the supplier of the services has established his business.

12. As far as the interpretation of the provisions of the Sixth Directive is concerned, it should also be pointed out that the concepts set out therein are Community concepts and must therefore be interpreted uniformly so as to avoid differences of interpretation as between Member States, which could result in double taxation or no tax being levied at all. [8] In addition to the requirement for uniform interpretation, there is the requirement

5 — Case 283/84 *Trans Tirreno Express* [1986] ECR 231, paragraph 15.

6 — *Berkholz*, paragraph 17.

7 — *Berkholz*, paragraph 18.

8 — See Case C-68/92 *Commission* v *France* [1993] ECR I-5881, Case C-69/92 *Commission* v *Luxembourg* [1993] ECR I-5907 and Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997.

that Community legislation should be certain and foreseeable, which, as the Court has consistently held, must be observed all the more strictly in the case of rules such as the Community VAT provisions which are liable to entail financial consequences in order that interested parties may know precisely the extent of their obligations. [9] The national court's questions have to be answered in the light of the aforementioned provisions and principles laid down in the case-law.

IV — Reply to the national court's questions

13. In this case, the essential question is what VAT legislation is applicable to activities consisting of the supply of food and drink to be consumed on the spot on a ferry plying between Denmark and Germany. In order to answer this question, it is necessary first to establish whether the transaction in question must be classed as a supply of goods or a supply of services within the meaning of the aforementioned provisions of the Sixth Directive. Once they have been so classed, it will be necessary to ascertain on that basis the place to which the transaction has to be connected for tax purposes.

Classification of an activity consisting of the supply of food and drink aboard a ship

14. In order to distinguish between the concepts of the 'supply of goods' and the 'supply of services', it will be necessary to identify the primary and secondary components of the activity in question.

Where, in the course of the crossing, the undertaking provides ferry passengers with food and drink for consideration without providing them with any additional services, what is involved is a 'supply of goods', in so far as the activity in question is characterized essentially by the supply of food and drink, which is the only aim contemplated by the passengers wishing to consume them.

In contrast, where — as appears to be the case here — the food and drink are provided to passengers at the same time as supplementary services, designed to enable those commodities to be consumed comfortably on board the ferry (that is to say, in the form of restaurant services), the latter services constitute the essential characteristic of the activity

9 — See C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23. See also Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24, and Joined Cases 92/87 and 93/87 *Commission* v *France and United Kingdom* [1989] ECR 405, paragraph 22.

in question, even though the activity also consists of the supply of food and drink. In this case, the price paid is essentially consideration for those services and a 'supply of services' is involved.

15. In addition, that classification is borne out by the International Standard Industrial Classification of all Economic Activities (ISIC), drawn up by the UN Statistical Office, [10] which classes under ex Major Group 85, 'personal services', restaurants, cafés, taverns and other drinking and eating places (Group 852). That classification of the activities in question also applies in Community law in so far as it was taken over by the two general programmes adopted by the Council in 1961 for the abolition of restrictions on freedom to provide services and restrictions on freedom of establishment. [11] Accordingly — as, moreover, the Court has held — the aforementioned international classification now forms part of Community law and, more specifically, of the aforementioned programmes and of the Community measures implementing those programmes. [12]

16. In addition, Directive 68/367/EEC, which the Council adopted on 15 October 1968, [13] is specifically concerned with the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the personal services sector, namely services provided by restaurants, cafés, taverns and other drinking and eating places and hotels, rooming houses, camps and other lodging places. Article 2(2) of the directive provides as follows: 'For the purposes of this Directive "activities falling within Group 852 (Restaurants, cafés, taverns and other drinking and eating places)" means activities pursued by a natural person, or company or firm, who habitually and by way of trade and in his own name and on his own account serves prepared food or beverages for consumption on the premises in the establishment or establishments run by him. The provisions of this Directive shall apply also to the serving of meals for consumption elsewhere than on the premises where they are prepared.' Consequently, it is clear that the activity in question must be classed as a supply of services under Community law.

17. I would further note that Council Directive 92/111/EEC of 14 December 1992 amending the Sixth Directive [14] contains a provision from which it emerges, indirectly but clearly, that the Community legislature regards catering activities on means of transport as a supply of services. Article 1(4) of that directive provides as follows: 'The Commission shall, by 30 June 1993 at the latest, submit to the Council a report accompanied, if necessary, by appropriate proposals on the place of taxation of goods supplied for consumption and

10 — UN Statistical Office, Statistical Papers, Series M, No 4, Rev. 1, New York, 1958.

11 — OJ, English Special Edition, Second Series, IX. Resolutions of the Council and of the Representatives of the Member States, pp. 3 and 7.

12 — Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, paragraph 12.

13 — OJ, English Special Edition 1968(II), p. 513.

14 — OJ 1992 L 384, p. 47.

services, including restaurant services, provided for passengers on board ships, aircraft or trains.'

Place of application of value added tax

18. The classification of the supply of food and drink on board ship as a supply of services means, under Article 9(1) of the Sixth Directive, that, for tax purposes, those services are subject to the legislation of the place where the supplier has established his business. In the instant case, therefore, the supply of services is taxable in Denmark, where the company operating the ferry between Faaborg and Gelting has established its business.

19. The Commission and the German Government submit in their observations that, in the event that the Court should class the activity in question as a supply of services, the place of supply should be deemed to be the place where the supplier has a fixed establishment. They argue that if the activity in question were to be connected with the place where the supplier has established his business, this would lead to a conflict as to fiscal jurisdiction between Member States, because under the legislation of some Member States, including Germany, the activity in question is classed as a supply of goods, whereas under the legislation of other countries, such as Denmark, it is classed as a supply of services. The Commission and the German Government argue that a fixed establishment should be held to exist on the ferry as far as the activity in question is concerned. This is because a restaurant undertaking operating on board ship satisfies all the criteria set out in *Berkholz*, where the establishment concerned is required to have a certain minimum size and both the human and technical resources necessary for the provision of the services have to be permanently present. [15]

20. I am unable to agree with that proposition, since, according to the Court's case-law, a fixed establishment cannot be taken into account where reference to the place where the supplier has established his business is appropriate for tax purposes. I would point out that, according to the case-law cited above, the place where the supplier of the service has established his business is the most appropriate reference point for tax purposes. [16] To connect the provision of taxable services to any establishment of the supplier whatsoever is of interest only where connecting it with the place where the supplier has established his business does not produce a rational result for tax purposes or creates a conflict with another Member State However, in this case, the risk of a conflict with another Member State is not caused by connecting the supply of the service with the place where the supplier has established his business, but by the fact that the tax legislation of two Member States classify the same

15 — *Berkholz*, paragraph 18.
16 — *Berkholz*, paragraph 17.

activity differently. That conflicting classification and the resulting conflict of tax jurisdiction can be avoided by using a uniform Community interpretation of the concept of 'supply of services' mentioned in Article 9 of the Sixth Directive in order to classify the activity in question.

21. Apart from that, to hold that there was a fixed establishment on board the ferry would not provide a satisfactory answer to the question before the Court. Such a solution would create practical problems in determining the place of supply where the ferry plies between two Member States or, *a fortiori*, where it passes on its journey successively through the territorial waters of the State from which it is sailing, through international waters and finally through the territorial waters of the State in which its destination lies.

22. In that event, it would be necessary to determine the amount of restaurant services provided over each stage of the ferry's journey in order to apply the corresponding VAT in accordance with the legislation applicable over each portion of the route. That solution would, however, be fraught with serious difficulties and would entail the risk of differing assessments by the national tax authority competent in each instance. Consequently, I do not consider that that solution would produce a rational delimitation of the fields of application of the laws of the Member States.

23. If, however, there were held to be a fixed establishment on a vessel, it would have to be connected with the territory of the Member State with which it has sufficiently close links. The Court has, moreover, employed that test in similar cases, such as where a national of a Member State had been in continuous employment on a ship registered in another Member State. Thus in the judgment in *Lopes da Veiga*, [17] the Court held that a Portuguese national employed on board a ship flying the Dutch flag had to be regarded as being employed in the Netherlands in so far as he had sufficiently close links with the territory of that State. Whether or not such links exist has to be determined in the light of circumstances such as the port at which the vessel is registered, the place where the company has its registered office and the application to the worker concerned of the social security or income tax law of the Member State in question.

That test would mean that the supply of services performed during the crossing would have to be taxed in the Member State with which the establishment on the vessel had close links. In this case, the Danish legislation would have to apply, since the ferry is registered at a Danish port and the company's registered office is located in that country.

17 — Case 9/88 *Lopes da Veiga* [1989] ECR 2989. See also the case-law according to which work carried out outside the territory of the Community may be regarded as activities carried out by workers employed on the territory of a Member State where there is a sufficiently close connection with the territory in question. See Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 27 and 28, and Case 237/83 *Prodest* [1984] ECR 3153, paragraphs 5, 6 and 7.

V — Conclusion

24. Having regard to the whole of the foregoing, I propose that the Court should answer the Bundesfinanzhof's question in the following terms:

The supply of food and drink to be consumed on the spot on board a ferry plying between two Member States, accompanied by restaurant services, constitutes a supply of services within the meaning of Article 6(1) and Article 9(1) 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 supply of such services is taxable in the Member State in which the provider of the services has established his business.