JUDGMENT OF THE COURT (Fifth Chamber)
6 November 1997 *

In Case C-116/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Reisebüro Binder GmbH

and

Finanzamt Stuttgart-Körperschaften

on the interpretation of Article 9(2)(b) of 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 (OJ 1977 L 145, p. 1),

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida, D. A. O. Edward, J.-P. Puissochet (Rapporteur) and P. Jann, Judges,

* Language of the case: German.

Advocate General: A. La Pergola,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Reisebüro Binder GmbH, by Peter Goth, Rechtsanwalt, Munich,

— the German Government, by Ernst Röder and Bernd Kloke, respectively Ministerialrat and Oberregierungsrat in the Federal Ministry of Economic Affairs, acting as Agents,

— the Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Reisebüro Binder GmbH, represented by Peter Goth; the German Government, represented by Ernst Röder; and the Commission, represented by Jürgen Grunwald, at the hearing on 5 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 17 July 1997,

gives the following

Judgment

1 By order of 8 February 1996, received at the Court on 10 April 1996, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling

under Article 177 of the EC Treaty a question on the interpretation of Article 9(2)(b) of 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 (OJ 1977 L 145, p. 1; hereinafter 'the Sixth Directive').

2 That question was raised in proceedings between Reisebüro Binder GmbH (hereinafter 'Binder') and the Finanzamt Stuttgart-Körperschaften concerning the determination of the taxable amount for VAT purposes in respect of transport services supplied in the context of cross-frontier motor-coach package tours.

3 Article 9 of the Sixth Directive provides as follows:

'1. 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.

2. However:

...

(b) the place where transport services are supplied shall be the place where the transport takes place, having regard to the distances covered;

...'.

4 Article 11A(1)(a) of the Sixth Directive provides that the taxable amount within the territory of the country is normally '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'.

5 According to the order for reference, the provisions of German legislation applicable to the facts of the case before the national court, which correspond to Articles 9(2)(b) and 11A(1)(a) of the Sixth Directive, are contained in the 1980 version of the Umsatzsteuergesetz (Law on Turnover Tax; hereinafter 'the 1980 Law').

6 Under Paragraph 3a(2), second subparagraph, of the 1980 Law, '[t]ransport services are supplied in the place where the transport takes place. Where transport is not confined to the tax collection area, this Law shall apply only to that part of the service which is supplied in that area'.

7 Lastly, Paragraph 10(1) of the 1980 Law provides that '[i]n respect of the supply of goods and services [...], taxable turnover shall be determined on the basis of the consideration. The consideration is the recipient's total outlay (net of turnover tax) for the purposes of obtaining the supply'.

8 Binder organizes cross-frontier package tours on board its own motor-coaches. It asked the German tax authorities to have regard — when determining, for the purposes of levying VAT on the supply of transport services, what proportion of the taxable amount was subject to their jurisdiction — not only to the distances covered, but also to the coaches' operational time and the passengers' stop-over time both within the territory of the country and abroad. When its request was refused, Binder brought proceedings, first before the appropriate Finanzgericht, and then — appealing on a point of law — before the Bundesfinanzhof.

9 Taking the view that the dispute raised a problem regarding the interpretation of the Sixth Directive, the Bundesfinanzhof referred the following question to the Court for a preliminary ruling:

'In the case of cross-frontier passenger transport, must Article 9(2)(b) of Directive 77/388/EEC be interpreted as meaning that, in order to determine the taxable amount for that part of the transport which takes place within the territory of the country,

(a) the total consideration must always be apportioned proportionately having regard to the distances covered, so that stopping and waiting periods between the various stages of the transport operation — on the occasion of educational trips, for example — are not taken into account, or

(b) does the aforesaid provision contain no more than rules concerning the *place* where the transport service is supplied, providing that solely the place of supply is to be determined having regard to the distances covered, which means that the Member States are free to determine the criterion according to which the total consideration is to be allocated between the taxable and non-taxable parts of the transport operation?'

10 Binder and the Commission take the view, essentially, that Article 9(2)(b) of the Sixth Directive only defines the place of supply of a transport service and that, for the purposes of apportioning on a territorial basis the consideration for that service, other factors may be taken into account in addition to the distances covered, such as the duration of stays in the various places where VAT is chargeable. They maintain that a significant proportion of Binder's costs primarily reflects, not the distances covered, but the time spent in providing the transport service in question.

11 The German Government contends, however, that Article 9(2)(b) of the Sixth Directive requires Member States always to apportion the total consideration for the supply of transport services having regard to the distances covered. Article 9(2)(b) takes into account the special character of transport services, of which

length of stay is not a significant feature, and would lose all substantive meaning if another method of apportionment could be adopted for the determination by the Member State concerned of the taxable amount for VAT purposes.

12 As the Court stated in paragraph 14 of its judgment in Case 168/84 *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251, Article 9 of the Sixth Directive, which is designed to secure the rational delimitation of the respective areas covered by national VAT rules by determining in a uniform manner the place where services are deemed to be supplied for tax purposes, both lays down a general rule in this area (Article 9(1)) and sets out a number of specific instances of places where certain services are deemed to be supplied (Article 9(2)). One of the aims of those provisions is to avoid conflicts of jurisdiction between Member States, which may result in double taxation.

13 Thus it is that, in the case of transport services, the place of performance, hence the place of supply for tax purposes, is deemed, by virtue of Article 9(2)(b), to be the place where transport takes place, having regard to the distances covered. As the Court pointed out in Case 283/84 *Trans Tirreno Express* v *Ufficio Provinciale IVA* [1986] ECR 231, paragraph 17, it was necessary to make that exception to the general rule laid down in Article 9(1) because a transporter's place of business is not an appropriate reference for establishing territorial jurisdiction for tax purposes. The very nature of the performance of the specific service constituted by transport, which is liable to be effected on the territory of more than one Member State, requires a different criterion, which essentially must make it possible to delimit the jurisdiction of each of the States involved for tax purposes.

14 That specific attachment rule for transport services, which constitutes a derogation from the general rules laid down in Article 9(1) of the Sixth Directive for determining the place where a service is supplied, is thus intended to ensure that each Member State taxes transport services in respect of the parts of the journey completed in its territory (Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 16, and C-331/94 *Commission* v *Greece* [1996] ECR I-2675, paragraph 10).

15 Although, in principle, that rule does not affect the method of determining the taxable amount in respect of the supply of transport services, which is governed by the general criteria laid down in Article 11A(1)(a), it inevitably affects the allocation to be made, when the taxable amount is determined on an all-inclusive basis, between the Member States in which the supply was effected. The definition of the place where the transport services are supplied as being the place where the transport operation is carried out, having regard to the distances covered, means that the allocation between the various places of supply is based on that specific criterion.

16 If this were not so, not only would that criterion be deprived of any real significance, but the risk would arise that, in respect of a single supply for which the total taxable amount can be determined without any particular difficulty in accordance with Article 11A(1)(a) of the Sixth Directive, various methods of allocating that total amount between the Member States concerned would be unpredictably applied. Moreover, such unpredictability would be liable to induce taxable persons to select the method of calculation which, by virtue of the different laws in force in the various Member States, is most advantageous to them, to the possible detriment of a method of allocation based on simple and objective criteria.

17 Thus, in circumstances such as those which characterize the case before the national court, in which the determination of the total consideration for the supply of a transport service is not contested and where the dispute concerns solely the method of allocating that consideration between the Member States in which the service was effected, the specific criterion laid down in Article 9(2)(b) of the Sixth Directive requires that allocation to be carried out on a pro rata basis having regard to the distances covered in each of the Member States concerned.

18 It should therefore be stated in reply to the question that Article 9(2)(b) of the Sixth Directive must be interpreted as meaning that, in the case of the supply of cross-frontier passenger transport on an all-inclusive basis, the total consideration for that service must, for the purposes of determining the part of the transport operation taxable in each of the Member States concerned, be allocated on a pro rata basis, having regard to the distances covered in each such State.

Costs

19 The costs incurred by the German Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesfinanzhof by order of 8 February 1996, hereby rules:

Article 9(2)(b) of 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 must be interpreted as meaning that, in the case of the supply of cross-frontier passenger transport on an all-inclusive basis, the total consideration for that service must, for the purposes of determining the part of the transport operation taxable in each of the Member States concerned, be allocated on a pro rata basis, having regard to the distances covered in each such State.

Gulmann Moitinho de Almeida Edward

Puissochet Jann

Delivered in open court in Luxembourg on 6 November 1997.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber