# OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 21 February 1989 *

*My Lords,*

1. The plaintiff, Mr Hamann, owned a yacht-charter business established in the Federal Republic of Germany and operating from Kiel. It appears from the order for reference that the yachts were generally sailed by the charterer for pleasure outside German territorial waters in Danish and Swedish waters — presumably in the Baltic Sea — and also as far as Norway and Finland. Therefore a large part of the utilization of the service supplied — the use of a yacht — took place outside German tax jurisdiction and within the tax jurisdiction of other countries, including countries not Member States of the European Communities.

2. In 1981 and 1982 the plaintiff submitted tax returns declaring a tax-free turnover of DM 75 064 and DM 132 943 for the years 1980 and 1981 respectively. These were accepted by the defendant, the local tax office, subject to verification. An inspector examined the plaintiff's books in 1983 and calculated an increase in VAT of DM 7 703.22 and DM 15 103.73 for the years 1980 and 1981 respectively. The increase was based on the fact that the service provided by the plaintiff was the hiring-out of a form of transport not of movable tangible property. The defendant agreed with this assessment (both of tax due and the reason on which it was based) and claimed the payment of tax accordingly on 7 May 1984. The plaintiff challenged the claim but the defendant rejected the challenge on 20 September 1985.

3. The plaintiff then challenged the latter decision before the Finanzgericht, Hamburg. That court, by order of 22 December 1987, received at the Court Registry on 17 February 1988, referred the following question on the interpretation of the Sixth VAT Directive (Sixth VAT 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 (77/388/EEC, Official Journal L 145, 13.6.1977, p. 1):

'Is Article 9(2) of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes of 17 May 1977 to be interpreted as meaning that ocean-going sailing yachts, that are used by their hirers for the practice of the sport of sailing, are "forms of transport" within the meaning of that directive?'

* Original language: English.

4. The purposes of the directive are clear from the preamble: they include establishing 'a basis of assessment determined in a uniform manner according to Community rules' (recital 2) and — with particular relevance to the present case — to resolve possible conflicts of jurisdiction between Member States as regards the supply of services (recital 7).

5. Article 2 of the directive provides, so far as material:

'The following shall be subject to value-added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such . . . '

Article 3 governs the territorial application of the directive: by Article 3(1), the 'territory of the country' is the area of application of the EEC Treaty as stipulated in respect of each Member State in Article 227. It has not been suggested that the application of the directive is affected by the fact that the yachts may have been sailed in part outside the territories of any of the Member States.

6. Article 9(1) of the directive, giving effect to recital 7 of the preamble, provides 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.'

7. Article 9(2) of the directive provides certain exceptions to that general rule. In particular, subparagraph (d) states (before amendment):

'in the case of the hiring-out of movable tangible property, with the exception of all forms of transport, which is exported by the lessor from one Member State with a view to its being used in another Member State, the place of supply of the service shall be the place of utilization.'

The reason for the exception made in the case of the hiring-out of movable property is no doubt to prevent distortion of trade and distortion of competition. To take the illustration given at the hearing by the agent of the Commission, if there were a substantial difference in the rate of VAT on the hiring-out of television sets, between the Federal Republic of Germany and Denmark, then to tax the hiring in the Member State from which the goods were supplied might lead to a substantial distortion.

8. However, that exception for the hiring-out of movable property is expressed to exclude 'all forms of transport', so that the hiring-out of forms of transport (other than for purely internal purposes) falls

within the general rule in Article 9(1). Thus the chartering of the yachts, if they are forms of transport, is to be deemed to take place where the supplier has established his business.

9. Again, the purpose of the exclusion from the exception of forms of transport is, in the ordinary case, readily apparent, since where such forms of transport as cars, vans, or even bicycles or horses, may be used across national frontiers, it would be wholly impracticable to seek to tax the hiring-out of such forms of transport in the 'place of utilization'.

10. Before addressing the issue whether yachts are to be regarded as forms of transport, I would add that it seems very doubtful whether, even if yachts are to be regarded as not being forms of transport, the present case would fall within the exception in Article 9(2)(d), which requires that movable property, to come within the exception, should have been exported by the lessor from one Member State with a view to its being used in another Member State. While that issue has not been addressed by the national court, it seems manifestly not the case that the yachts were exported by the lessor, Mr Hamann, with a view to their being used in another Member State, and therefore the hiring of the yachts would not fall within the exception even if they were to be regarded as movable property. The reason why the issue has not been addressed by the national court appears to be that the German legislation, the German Law of 1980 on Turnover Tax ('Umsatzsteuergesetz'), does not contain the requirement set out above; it merely provides, in Article 3a(2)4, that the hiring-out of movable physical objects is carried out where the objects are used ('Die Vermietung beweglicher körperlicher Gegenstände — ausgenommen Beförderungsmittel — wird dort ausgeführt, wo die Gegenstände genutzt werden').

11. Although it is therefore likely that the reference in this case was not strictly necessary to decide the dispute, it is well established that this Court must nevertheless rule on the question referred and I therefore turn to that question. The plaintiff in the main proceedings argues, in essence, that yachts sailed for pleasure purposes are not forms of transport since transport is not the main purpose for which they are used. That view is contested by the Tax Office, by the German Government and by the Commission, which contend in substance that the term 'forms of transport' must be understood more widely as covering any means of conveyance even if it is not used principally as a means of conveyance.

12. At first sight, it would seem that the expression 'forms of transport' might be interpreted either in the sense contended for by Mr Hamann or in the wider sense. On the one hand, it could be contended that the essential criterion of a means of transport is its functional purpose; and that the transportation of yachtsmen, and the contents of the yacht, is merely incidental to the purpose of sailing, which is primarily a recreational activity. On that view, a sailing boat is primarily an item of leisure equipment rather than a means of transport. On the other hand, it could be said that, although the reasons for sailing may be of a purely recreational or sporting character,

nevertheless transportation occurs whatever the reasons for which it is undertaken, and that a boat is a form of transport, whatever the purposes for which it is used. Indeed, these two views, it appears, are reflected in the case-law of the German courts.

13. However, in my view, there is a clear answer to the question of interpretation as it arises in the context of the Sixth Directive. First, as I have already pointed out, the purpose underlying the provisions points to a broad interpretation of the term. Indeed, because of the practical difficulties in taxing such supplies of services, if a narrower interpretation were adopted, there would be a risk that such supplies of services would escape taxation altogether. Moreover any derogation from the directive must be interpreted restrictively, which points here to a broad interpretation of the term in issue. Such an interpretation also finds some support in the language of the provision itself: while in the German version of Article 9(2)(d) the term used is 'außer Beförderungsmitteln', that is 'with the exception of means of transport', other language versions include an additional encompassing adjective: in English 'all', in French 'tout' and so on, indicating that the term is intended in the most comprehensive sense.

14. Of no less significance is the fact that, as the Commission has pointed out, Article 15(2) of the directive expressly refers to 'pleasure boats and private aircraft or any other means of transport for private use', thus clearly — although in another context — including pleasure boats, which chartered sailing yachts are, within the meaning of 'means of transport'. I do not regard the slightly different formulation in the English version — 'means' instead of 'forms' — as significant, and other language versions use the same words in both places.

15. Later legislation in the same field, which may be used for comparative purposes, is also of interest. In the directive of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (83/182/EEC, Official Journal L 105, 23.4.1983, p. 59), Article 1(1) includes in the scope of the directive (and, by implication, within the meaning of 'certain means of transport') *inter alia* 'pleasure boats'. On this occasion, there is a slight difference of wording in other language texts. Instead of 'Beförderungsmitteln' the German has 'Verkehrsmittel'. The French continues to use 'moyens de transport'. Once again, however, the linguistic differences are not significant and it is clear that the concept, as envisaged by the Community legislator, remains the same since the directive itself is designed to fit into the general VAT system.

16. Taking these points together I am led to the conclusion that pleasure boats (including chartered yachts) were intended to be included in the expression 'forms of transport'.

17. In reaching that conclusion I do not take account of the fact that Article 9 of the Sixth Directive was amended by the Tenth VAT Directive (84/386/EEC, Official Journal L 208, 3.8.1984, p. 58), since that directive was adopted on 31 July

1984 and was to be implemented by 1 July 1985 and therefore does not affect this case. The final recital of the preamble to that directive makes it clear that the Community legislator wished to ensure strict application of the general rule in Article 9(1):

'... as regards the hiring-out of forms of transport, Article 9(1) should, for reasons of control, be strictly applied, the place where the supplier has established his business being treated as the place of supply of such services'.

18. Accordingly, in my opinion the answer to be given to the referring court should be as follows:

'Ocean-going sailing yachts, hired out for the purpose of sailing, are "means of transport" within the meaning of Artice 9(2) of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes.'