JUDGMENT OF THE COURT (Sixth Chamber)
17 July 1997 *

In Case C-190/95,

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

ARO Lease BV

and

Inspecteur der Belastingdienst Grote Ondernemingen, Amsterdam

on the interpretation of Article 9(1) 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 (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, C. N. Kakouris (Rapporteur), P. J. G. Kapteyn and G. Hirsch, Judges,

* Language of the case: Dutch.

Advocate General: N. Fennelly,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted:

— on behalf of ARO Lease BV, by J. L. M. J. Vervloed, tax consultant,

— by the Inspecteur van de Belastingdienst Grote Ondernemingen (Tax Inspector for Large Businesses), Amsterdam,

— on behalf of the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— on behalf of the Belgian Government, by J. Devadder, Director of Administration in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— on behalf of the Danish Government, by P. Biering, Head of Directorate in the Ministry of Foreign Affairs, acting as Agent,

— on behalf of the French Government, by C. de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and A. de Bourgoing, Chargé de Mission in the same directorate, acting as Agents, and

— on behalf of the Commission of the European Communities, by B. J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of ARO Lease BV, represented by J. L. M. J. Vervloed; of the Netherlands Government, represented by J. S. van den Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; of the German Government, represented by B. Kloke, Oberregierungsrat in the Federal Ministry of the Economy, acting as Agent; of the French Government, represented by A. de Bourgoing; and of the Commission, represented by B. J. Drijber, at the hearing on 24 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 12 December 1996,

gives the following

Judgment

1 By order of 7 June 1995, received at the Court on 19 June 1995, the Gerechtshof (Regional Court of Appeal), Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 9(1) 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 Sixth Directive').

2 That question was raised in proceedings between ARO Lease BV ('ARO'), established in 's-Hertogenbosch, in the Netherlands, and the Netherlands tax authorities concerning the payment of value added tax ('VAT') on services which it had supplied in Belgium.

3 It appears from the documents in the main proceedings that ARO is a leasing company whose principal business is supplying, as lessor, passenger cars to its custom-

ers under leasing agreements. During the material period, such agreements were concluded in respect of some 6 000 passenger cars in the Netherlands and some 800 in Belgium. Of the latter agreements, 90% were concluded with businesses and the remainder with private individuals. The agreements in question were concluded for a period of three to four years and were drawn up in ARO's offices in 's-Hertogenbosch. ARO does not have an office in Belgium.

4 ARO's customers in Belgium enter into contact with ARO through self-employed intermediaries established in Belgium, who are paid a commission for their services. The Belgian customers generally choose the car themselves from a dealer established in Belgium. The dealer delivers the car to ARO, which pays the purchase price. ARO then makes the car available to the customer under a leasing agreement. The vehicles are registered in Belgium. The Belgian intermediaries are not involved in the performance of the agreements. Those agreements provide, *inter alia*, that the cost of maintaining the car and the Belgian road tax due fall to the customer. Repairs and assistance in the event of damage to the car, however, are paid for by ARO, which has taken out insurance against such risks as the owner of the car.

5 At the end of the agreed term of the lease, ARO informs the customer of the price for which the car can be bought. If the car cannot be sold immediately, it is temporarily stored on ARO's behalf and at ARO's risk on the premises of a dealer in Belgium, since ARO does not have storage premises of its own in Belgium.

6 ARO has always paid VAT in the Netherlands in respect of the leasing of passenger cars in Belgium under the abovementioned agreements, under Article 6(1) of the Wet op de Omzetbelasting (Netherlands Law on Turnover Tax) 1968, which

transposes Article 9(1) of the Sixth Directive. Article 9(1) of the Sixth Directive provides:

'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 The Belgian tax authorities, however, consider that, since January 1993, the mere presence in Belgium of a fleet of cars owned by ARO means that ARO has a fixed establishment in Belgium from which it supplies cars under leasing agreements. On that basis, ARO must pay VAT in Belgium in respect of the services in question, a claim which it does not dispute. The Netherlands tax authorities, however, consider that the place where the services are supplied is in the Netherlands under Article 9(1) of the Sixth Directive, on the ground that ARO has no fixed establishment in Belgium because it has no staff or technical facilities there to conclude the leasing agreements.

8 The dispute between ARO and the Netherlands tax authorities concerns the sum of HFL 389 753 which ARO paid in VAT for November 1993 and which it seeks to have refunded.

9 The Gerechtshof, Amsterdam, hearing the dispute, considers that the place where the services in question are supplied is determined by the rule laid down in Article 9(1) of the Sixth Directive. It must ascertain whether those services are supplied from a fixed establishment in Belgium within the meaning of that provision. Uncertain as to the interpretation of Article 9(1) of the Sixth Directive, the

Gerechtshof stayed the proceedings and sought a preliminary ruling by the Court on the following question:

'Must 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, be interpreted as meaning that a taxable person established in the Netherlands who, as such, makes available to third parties approximately 6 800 passenger cars under operational-lease agreements, of which approximately 800 were purchased and made available in Belgium in the manner and in the circumstances described' in the order for reference, 'supplies those services from a fixed establishment in Belgium?'

10 By that question, the national court seeks in substance to ascertain whether, on a proper construction of Article 9(1) of the Sixth Directive, a leasing company established in one Member State supplies services from a fixed establishment in another Member State if it makes passenger cars available in the second State under leasing agreements to customers established there, if its customers have entered into contact with it through self-employed intermediaries established in the second State, if they have chosen their cars from dealers established in the second State, if the leasing company has acquired the cars in the second State, in which they are registered, and has made them available to its customers under leasing agreements drawn up and signed at its main place of business, and if the customers bear maintenance costs and pay road tax in the second State, but the leasing company does not have an office or any premises on which to store the cars there.

11 The preliminary point must be made that the leasing of vehicles constitutes a supply of services within the meaning of Article 9 of the Sixth Directive.

12 In order to answer the question raised, it must first be noted that, as stated in the fourth recital in the preamble to Tenth Council Directive 84/386/EEC of 31 July 1984 on the harmonization of the laws of the Member States relating to turnover

taxes, amending Directive 77/388/EEC — Application of value added tax to the hiring out of movable tangible property (OJ 1984 L 208, p. 58, 'the Tenth Directive'), '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'.

13 Thus, under Article 9(2)(e) of the Sixth Directive, as amended by the Tenth Directive, 'all forms of transport' are expressly excluded from the derogation whereby, for the 'hiring out of movable tangible property', the place where the services are supplied is 'the place where the customer has established his business or has a fixed establishment ...'. Forms of transport are thus governed by the general rule in Article 9(1) of the Sixth Directive.

14 The Court has, moreover, noted in that regard that, since forms of transport may easily cross frontiers, it is difficult, if not impossible, to determine the place of their utilization and that in each case a practical criterion must therefore be laid down for charging VAT. Consequently, for the hiring out of all forms of transport, the Sixth Directive provided that the service should be deemed to be supplied not at the place where the goods hired out are used but, with a view to simplification and in conformity with the general rule, at the place where the supplier has established his business (Case 51/88 *Hamann* v *Finanzamt Hamburg-Eimsbüttel* [1989] ECR 767, paragraphs 17 and 18).

15 Furthermore, as regards the general rule in Article 9(1) of the Sixth Directive, the Court has held that the place where the supplier has established his business is a primary point of reference inasmuch as there is no purpose in referring to another establishment from which the services are supplied unless reference to the main place of business does not lead to a rational result for tax purposes or creates a conflict with another Member State. It is clear from the aim of Article 9 and from the context in which the concepts are employed that services cannot be deemed to

be supplied at an establishment other than the main place of business unless that establishment has a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of the services (Case 168/84 *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251, paragraphs 17 and 18).

16 Consequently, in order to be treated, by way of derogation from the primary criterion of the main place of business, as the place where a taxable person provides services, an establishment must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis.

17 On that basis, it must be considered whether the facts set out by the national court are sufficient for a leasing company to be regarded as having a fixed establishment in a Member State.

18 The services supplied in the leasing of vehicles, it must be noted, consist principally in negotiating, drawing up, signing and administering the relevant agreements and in making the vehicles concerned, which remain the property of the leasing company, physically available to customers.

19 Consequently, when a leasing company does not possess in a Member State either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up or management decisions taken and thus to enable the services in question to be supplied on an independent basis, it cannot be regarded as having a fixed establishment in that State.

20 It is, moreover, clear from both the wording and the aim of Article 9(1) and 9(2)(e) of the Sixth Directive and from the judgment in *Hamann*, cited above, that neither the physical placing of vehicles at customers' disposal under leasing agreements nor the place at which they are used can be regarded as a clear, simple and practical criterion, in accordance with the spirit of the Sixth Directive, on which to base the existence of a fixed establishment.

21 The existence of other factors and other transactions, such as those which take place in Belgium, ancillary and supplementary to the leasing services, cannot invalidate that conclusion. The fact that customers choose their vehicles themselves from Belgian dealers has no bearing on the place of establishment of the supplier of services. Nor can the self-employed intermediaries who bring interested customers into contact with ARO be regarded as permanent human resources within the meaning of the case-law cited above. Finally, the fact that the vehicles concerned in the main proceedings are registered in Belgium, where road tax is also payable, relates to the place where they are used, and that factor, in accordance with the case-law cited above, is irrelevant for the purposes of applying Article 9(1) of the Sixth Directive.

22 Consequently, in circumstances such as those of the case in the main proceedings, the services cannot be considered as being provided from a fixed establishment.

23 The Commission and the Danish Government, however, submit that account must be taken of economic reality when applying Article 9(1) of the Sixth Directive to forms of transport, and the place where the services are provided must be held to be the place where the business in question is actually carried on.

24 The concept of the place where a business is actually carried on was not overlooked, it must be stressed, by the Community legislature, as is clear from the scheme of Article 9 of the Sixth Directive and the rule in Article 9(2)(c) that, by way of derogation from the general rule in Article 9(1), the place in which certain types of service are provided is the place where they are physically carried out.

25 That concept also had a bearing on the current formulation of the general rule in Article 9(1), and the specific provisions relating expressly to forms of transport, set out above.

26 Consequently, the interpretation favoured by the Commission and by the Danish Government would run counter to the intention of the legislature, which, taking economic reality into account, as regards forms of transport, has decided to introduce a clear, simple and practical criterion, namely the main place of business or that of a fixed establishment.

27 On the basis of those considerations, the answer to the question raised must be that, on a proper construction of Article 9(1) of the Sixth Directive, a leasing company established in one Member State does not supply services from a fixed establishment in another Member State if it makes passenger cars available in the second State under leasing agreements to customers established there, if its customers have entered into contact with it through self-employed intermediaries established in the second State, if they have chosen their cars from dealers established in the second State, if the leasing company has acquired the cars in the second State, in which they are registered, and has made them available to its customers under

leasing agreements drawn up and signed at its main place of business, and if the customers bear maintenance costs and pay road tax in the second State, but the leasing company does not have an office or any premises on which to store the cars there.

Costs

28 The costs incurred by the Netherlands, Belgian, Danish, German and French Governments 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Gerechtshof, Amsterdam, by order of 7 June 1995, hereby rules:

On a proper construction of Article 9(1) 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, a leasing company established in one Member State does not supply services from a fixed establishment in another Member State if it makes passenger cars available in the second State under leasing agreements to customers established there, if its customers have entered into contact with it through self-employed intermediaries established in the second State, if they

have chosen their cars from dealers established in the second State, if the leasing company has acquired the cars in the second State, in which they are registered, and has made them available to its customers under leasing agreements drawn up and signed at its main place of business, and if the customers bear maintenance costs and pay road tax in the second State, but the leasing company does not have an office or any premises on which to store the cars there.

Mancini Murray Kakouris

Kapteyn Hirsch

Delivered in open court in Luxembourg on 17 July 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber