JUDGMENT OF THE COURT (Sixth Chamber)
26 September 1996 *

In Case C-327/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht, Cologne (Germany), for a preliminary ruling in the proceedings pending before that court between

Jürgen Dudda

and

Finanzamt Bergisch Gladbach

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

THE COURT (Sixth Chamber),

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

* Language of the case: German.

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

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

— the Italian Government, by Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and Maurizio Fiorilli, Avvocato dello Stato,

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

having regard to the Report for the Hearing,

after hearing the oral observations of the parties at the hearing on 7 March 1996,

after hearing the Opinion of the Advocate General at the sitting on 25 April 1996,

gives the following

Judgment

1 By order of 17 October 1994, received at the Court on 12 December 1994, the Finanzgericht (Finance Court), Cologne, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of

Article 9(2)(c) 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 (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 Those questions were raised in proceedings between Mr Dudda and the Finanzamt (Tax Office), Bergisch Gladbach (hereinafter 'the Finanzamt') concerning the payment of turnover tax on services supplied by him outside Germany.

3 Article 9(1) of the Sixth Directive lays down the following general rule:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business ...'.

4 The first indent of Article 9(2)(c) provides that:

'the place of the supply of services relating to:

— cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organizers of such activities, and where appropriate, the supply of ancillary services,

(...)

shall be the place where those services are physically carried out'.

5 In Germany, the Umsatzsteuergesetz (Law on Turnover Tax, hereinafter 'the UStG') contains a provision which is the counterpart to Article 9(1) of the Sixth Directive and a provision concerning 'artistic, entertainment or similar services, including those supplied by the organizers', which is similar to the first indent of Article 9(2)(c) of the Sixth Directive.

6 Mr Dudda's business involves the supply of technical acoustic services, in particular sound-engineering for concerts and similar events. His business is established in Germany, but most of the events for which he provides the acoustics take place abroad, some of them in other Member States of the European Union.

7 It is apparent from the order for reference that it is always the organizer of an event who orders the work from Mr Dudda. Essentially, his task is to attend to the sound-engineering arrangements for the event in question. For that purpose, he first determines what sound-engineering equipment is required and how it must be used in order to obtain optimum sound levels or particular sound effects. For some special events, such as the 'Klangwolke' (cloud of sound) projects, the sound performances have to be coordinated with other effects (for example lighting effects, laser displays, and fireworks). Mr Dudda supplies the organizer for consideration with the equipment he considers to be necessary and with the personnel to operate it; some of the equipment belongs to his own business and some is hired from other suppliers. Together with his assistants, he sets up, adjusts and operates the sound-engineering devices used and he receives a single payment from the organizer for his services as a whole.

8 The Finanzamt charged turnover tax on the payments received by Mr Dudda for events which took place in 1985 and 1986 outside Germany. After lodging an unsuccessful objection, Mr Dudda brought an action contesting the decision of the Finanzamt before the national court.

9 Mr Dudda claims that the services in dispute are 'artistic, entertainment or similar services' within the meaning of the UStG and that any other interpretation would be contrary to Article 9(2)(c) of the Sixth Directive. Since those services were physically carried out outside Germany, they are not taxable in Germany.

10 By contrast, the Finanzamt maintains that the services in question cannot be classified as artistic, entertainment or similar services. The place where they are supplied is therefore determined by the general rule, namely the place where the supplier has established his business. Consequently, according to the defendant, they are taxable in Germany.

11 The Finanzgericht, Cologne, inclines to the view that the services at issue are not to be regarded as 'artistic' or 'entertainment' or even as 'similar' services within the meaning of the German law. It considers, however, that a different interpretation might result from the application of Article 9(2)(c) of the Sixth Directive, particularly since that provision also refers to 'the supply of services ancillary' to cultural, artistic or similar activities.

12 Taking the view, therefore, that an interpretation of Article 9(2)(c) of the Sixth Directive is necessary in order to enable it to resolve the case before it, the Finanzgericht decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(a) Does a person who, at artistic or entertainment events, carries out the sound-engineering of the performance supply a service within the meaning of Article 9(2)(c) of the Sixth VAT Directive where his task consists in

— choosing and operating the equipment used and adjusting it to the particular acoustic conditions and the desired sound effects

and

— also supplying the requisite equipment and the necessary operating staff?

(b) Does it make any difference if he has undertaken in addition to coordinate the sound effects to be produced with his assistance with certain visual effects produced by other persons?'

Question 1

13 By this question, the national court seeks to ascertain whether the first indent of Article 9(2)(c) of the Sixth Directive is to be interpreted as covering the activity of a person who provides sound-engineering for artistic or entertainment events by choosing and operating the equipment used, adjusting it to the particular acoustic conditions and the desired sound effects, and who supplies the requisite equipment and operating staff.

14 The German Government observes that such activity does not come within the scope of the first indent of Article 9(2)(c), but within that of Article 9(1), of the Sixth Directive. It points out that since the former provision derogates from the latter, it should be interpreted strictly and that, in consequence, where serious doubts arise as to its applicability, the general rule set out in Article 9(1) should be applied as a matter of priority.

15 In the circumstances, the German Government believes that there are at the very least serious doubts as to whether the services described in the first question are covered by the first indent of Article 9(2)(c) of the Sixth Directive. Those services make it possible for artistic or entertainment activities, *inter alia*, to take place but they do not themselves constitute artistic, entertainment or similar activities for the purposes of that provision, since the culturally creative factor is missing.

16 As to whether such services can be regarded as ancillary to artistic or entertainment activities, the German Government considers that there are two possible

interpretations of the word 'ancillary'. According to the first, 'ancillary' means services ancillary to the person providing the principal service (for example, all the services provided by an artist ancillary to his principal artistic performance); according to the second, it means services ancillary to the content of the principal service (for example, any service ancillary to the principal artistic activity, irrespective of the person providing it).

17 The German Government favours the first interpretation. It refers to the objective pursued by Article 9(2)(c), which is, in order to simplify matters, to allow artists, sportsmen and so on to have a single location for tax purposes for all activities ancillary to their principal performance in connection with an event. That approach makes it possible to solve the problem of tax avoidance by highly mobile providers of services, like artists, who can easily move the place of business or establishment from which they operate to countries which are tax havens.

18 The German Government claims that the second interpretation, on the other hand, gives rise to a risk of tax avoidance and abuse by suppliers of services whose activity is not of a mobile kind and who have their place of business or fixed establishment in one Member State but who supply their services in another Member State. It is difficult to monitor services of that kind which are provided in various Member States. Thus, in this case, there is no evidence that Mr Dudda actually paid turnover tax in the Member States in which the events in question took place. It is therefore simpler for turnover tax to be collected in the Member State in which such a supplier of services is established.

19 Finally, the German Government maintains that the suggested interpretation is also supported by the wording of the first indent of Article 9(2)(c) which uses the expression 'where appropriate'. That expression would be unnecessary if the second interpretation were correct, because in that case any service supplied by a

third party which was in any way related to the principal service, in particular an artistic or entertainment service, would come within the scope of the provision in question as an ancillary service.

20 As regards the relationship between Article 9(1) and Article 9(2), the Court has already held that Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) lays down the general rule on the matter. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, secondly, non-taxation, as Article 9(3) indicates, albeit only as regards specific situations (Case 168/84 *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251, paragraph 14).

21 It follows that, when Article 9 is interpreted, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1).

22 Accordingly, it is necessary to determine the scope of Article 9(2) in the light of its purpose which is set out as follows in the seventh recital in the preamble to the directive:

' ... the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards supplies of goods for assembly and the supply of services; ... although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods'.

23 The overall purpose of Article 9(2) of the Sixth Directive is accordingly to establish a special system for services provided between taxable persons where the cost of the services is included in the price of the goods.

24 There is a similar purpose underlying the first indent of Article 9(2)(c) which lays down that the place of the supply of services relating *inter alia* to artistic and entertainment activities and ancillary services is the place where those services are physically carried out. The Community legislature considered that, in so far as the supplier provides his services in the State in which such services are physically carried out and the organizer of the event charges the final consumer VAT in the same State, the VAT charged on the basis of all those services the cost of which is included in the price of the complete service paid for by the final consumer must be paid to that State and not to the State in which the supplier of the service has established his business.

25 As regards the criteria according to which a specified service is to be regarded as being covered by the first indent of Article 9(2)(c), no particular artistic level is required, and it is not only services relating *inter alia* to artistic and entertainment activities but also services relating to merely similar activities that fall within its scope.

26 Where, as in the circumstances mentioned in the first question, the artistic or entertainment nature of the principal activity is not in dispute, it remains to be considered whether a service such as that at issue in the main proceedings constitutes a supply of ancillary services within the meaning of the first indent of Article 9(2)(c) of the Sixth Directive.

27 Having regard to the findings made in paragraphs 24 and 25 of this judgment, any services supplied which, although not themselves constituting *inter alia* an artistic or entertainment activity, are a prerequisite for its performance, must be regarded as a supply of services ancillary to that activity.

28 The services in question are, therefore, ancillary to the principal activity from an objective point of view, irrespective of the person providing them.

29 That interpretation is supported by the wording of the first indent of Article 9(2)(c) of the Sixth Directive which refers to the supply of services ancillary to *inter alia* artistic or entertainment activities without any mention of the persons carrying on those activities.

30 Moreover, the expression 'where appropriate' does not contradict the interpretation so elicited, in so far as it simply indicates that there is not always an activity ancillary to the principal artistic or entertainment activity.

31 It follows that since the provision of sound-engineering for an artistic or entertainment event is a prerequisite for the staging of that event, it must be regarded as an ancillary service within the meaning of the first indent of Article 9(2)(c) of the Sixth Directive.

32 The risk of tax avoidance and abuse by suppliers of such services who, while they have established their business in one Member State, supply their services in another, cannot result in a different interpretation. Moreover, as the Commission stated at the hearing and the Advocate General pointed out in paragraphs 24 and 45 of his Opinion, Articles 21 and 22(7) of the Sixth Directive permit the tax authorities of the Member States to take the necessary measures to counter that risk.

33 The answer to the first question must therefore be that the first indent of Article 9(2)(c) of the Sixth Directive is to be interpreted as covering the activity of a person who provides sound-engineering for artistic or entertainment events by choosing and operating the equipment used, adjusting it to the particular acoustic conditions and the desired sound effects, and who supplies the requisite equipment and operating staff, where the service which he provides constitutes a prerequisite for the performance of the principal artistic or entertainment service supplied.

Question 2

34 It is apparent from the order for reference that, in the proceedings before the national court, Mr Dudda claimed that the services he provided for the 'Klangwolke' projects, in the course of which sound performances had to be coordinated with certain visual effects, constituted entertainment activities in themselves.

35 It was in the light of those circumstances that the national court referred the second question.

36 It is for the national court to determine whether the coordination of sound effects produced by one person with certain visual effects produced by other persons constitutes in itself an entertainment service rather than an activity ancillary thereto. The question is in any event irrelevant, since all those services are covered by the same provision, namely the first indent of Article 9(2)(c) of the Sixth Directive.

37 The answer to the second question must therefore be that the fact that the person concerned has undertaken in addition to coordinate the sound effects to be produced with his assistance with certain visual effects produced by other persons cannot affect the answer given to the first question.

Costs

38 The costs incurred by the German and Italian Governments and 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 (Sixth Chamber),

in answer to the questions referred to it by the Finanzgericht, Cologne, by order of 17 October 1994, hereby rules:

1. **The first indent of Article 9(2)(c) 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 must be interpreted as covering the activity of a person who provides sound-engineering for artistic or entertainment events by choosing and operating the equipment used, adjusting it to the particular acoustic conditions and the desired sound effects, and who supplies the requisite equipment and operating staff, where the service which he provides**

constitutes a prerequisite for the performance of the principal artistic or entertainment service supplied.

2. **The fact that the person concerned has undertaken in addition to coordinate the sound effects to be produced with his assistance with certain visual effects produced by other persons cannot affect the answer given to the first question.**

Kakouris Kapteyn Murray

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber