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61996J0145

Judgment of the Court (Sixth Chamber) of 16 September 1997. - Bernd von Hoffmann v Finanzamt Trier. - Reference for a preliminary ruling: Finanzgericht Rheinland-Pfalz, Neustadt an der Weinstrasse - Germany. - Sixth VAT Directive - Interpretation of Article 9(2)(e), third indent - Services of an arbitrator - Place where services are supplied. - Case C-145/96.

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Keywords

Tax provisions - Harmonization of laws - Turnover taxes - Common system of value added tax - Supplies of services - Determination of the relevant place for tax purposes - Services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services - Definition - Services of a member of an arbitration tribunal - Excluded

(Council Directive 77/388, Art. 9(2)(e), third indent)

Summary

Article 9(2)(e), third indent, of the Sixth Directive 77/388 on the harmonization of the laws of the Member States relating to turnover taxes, which provides, as part of the special rules governing services supplied to customers established outside the Community or to taxable persons established in the Community but not in the same country as the supplier, that the place where the services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services are supplied is to be the place where the customer has established his business or has a fixed establishment to which the service is supplied, uses the professions mentioned as a means of defining the categories of services to which it refers. On a proper construction, it does not refer to the services of a member of an arbitration tribunal.

The services of an arbitrator, which are principally and habitually those of settling a dispute between two or more parties, do not fall within the category of those carried out by a lawyer, which are principally and habitually those of representing or defending the interests of a person, or of those carried out by a consultant, engineer, consultancy bureau or accountant, since none of the services principally and habitually provided as part of any of those professions concerns the

settling of a dispute between two or more parties. Nor can the services of an arbitrator be regarded as similar, within the meaning of Article 9(2)(e), to those of the professions listed in that provision since, based as they are on considerations of justice and equity, they do not serve the same purposes as those of a lawyer taking part in a negotiation with a view to reaching an agreement, which are essentially based on expediency and the weighing-up of interests, or of a consultant, engineer, consultancy bureau or accountant.

Parties

In Case C-145/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht Rheinland-Pfalz, Neustadt an der Weinstrasse, Germany, for a preliminary ruling in the proceedings pending before that court between

Bernd von Hoffmann

and

Finanzamt Trier

on the interpretation of Article 9(2)(e), third indent, 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: G.F. Mancini, President of the Chamber, C.N. Kakouris (Rapporteur), G. Hirsch, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: N. Fennelly,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Bernd von Hoffmann, by Theo Bomm, Rechtsanwalt, Trier,

- Finanzamt Trier, by Albert Blümling, Leitender Regierungsdirektor, Head of the Finanzamt Trier, acting as Agent,

- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Sabine Maass, Regierungsrätin in the same ministry, acting as Agents, and

- the Commission of the European Communities, by Jörn Sack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Professor von Hoffmann, represented by Theo Bomm; of the Finanzamt Trier, represented by Werner Widmann, Leitender Ministerialrat in the Rheinland-Pfalz Ministry of Finance, acting as Agent; of the German Government, represented by Bernd Kloke, Oberregierungsrat in the Federal Ministry of the Economy, acting as Agent; of the United Kingdom Government, represented by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and

Nicholas Paines, Barrister; and of the Commission, represented by Jürgen Grunwald, Legal Adviser, acting as Agent, at the hearing on 25 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,

gives the following

Judgment

Grounds

1 By order of 15 March 1996, received at the Court on 3 May 1996, the Finanzgericht Rheinland-Pfalz (Financial Court, Rhineland-Palatinate), Neustadt an der Weinstrasse, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 9(2)(e), third indent, 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 Directive').

2 That question was raised in proceedings between Professor von Hoffmann and the Finanzamt (Tax Office), Trier, concerning the payment of turnover tax on services as an arbitrator which he provided in France.

3 Article 9(1) of the 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 Article 9(2)(e), third indent, then provides:

`The place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

- services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information.'

5 In Germany, the Umsatzsteuergesetz (Law on Turnover Tax, hereinafter `the UstG') contains a Paragraph 3a, the wording of subparagraph 1 of which is analogous to that of Article 9(1) of the Directive.

6 Under subparagraphs 3 and 4(3) of Paragraph 3a, read together, as they applied at the material time, services arising out of the activities of lawyers, patent consultants, tax consultants, auditors, experts, engineers and members of supervisory boards, and legal, business and technical advice given by other business operators, are deemed to be supplied, by way of derogation from subparagraph 1, at the place where the recipient carries on business when the recipient is a business operator. If such a service is supplied for a business operator's place of business, that place is to be regarded as the place where the service was supplied. In addition, under subparagraph 2(3)(a) of Paragraph 3a of the UstG, the place where scientific or similar services are supplied is the place where the business operator exclusively or essentially carries on business.

7 In 1987, 1988 and 1989, according to the case-file, Professor von Hoffmann, who is Professor of Civil Law at the University of Trier, Germany, acted as an arbitrator for the International Chamber of Commerce, based in Paris. Professor von Hoffmann was a member of an international arbitration tribunal settling disputes between undertakings by means of arbitration decisions or drawing up agreed settlements between the parties. The tribunal is composed of three arbitrators and is convened for each individual case. The International Chamber of Commerce determines the amount of the fees and their distribution among the members of the arbitration tribunal. The arbitrators receive their payment through the International Chamber of Commerce.

8 The Finanzamt Trier, the defendant in the main proceedings, charged turnover tax in Germany on the fees received by Professor Hoffmann during the years in issue. The objections lodged by Professor Hoffmann against that charging were rejected as unfounded by decision of 19 July 1994.

9 Professor von Hoffmann then brought an action challenging that decision before the Finanzgericht Rheinland-Pfalz.

10 The issue between the parties in the proceedings before that court is whether the income received by Professor von Hoffmann from his activities as an arbitrator should be subject to turnover tax in Germany.

11 Professor von Hoffmann considers that such income is not taxable under Paragraph 3a(1) of the UstG. In his view, they fall under Paragraph 3a(2)(3)(a) as scientific services or at least as services similar to such.

12 The Finanzamt Trier challenges that view and maintains that, since Professor von Hoffmann is a business operator, the place where the services in issue were supplied was in Germany, in accordance with the rule laid down in Paragraph 3a(1) of the UstG.

13 The Finanzgericht Rheinland-Pfalz finds that the services supplied by Professor von Hoffmann are not scientific or `similar' services within the meaning of Paragraph 3a(2)(3)(a). Nor, it holds, is the activity of an arbitrator either that of an expert or lawyer, or legal advice, within the meaning of Paragraph 3a(4)(3). It considers, however, that a different interpretation might be reached under Article 9(2)(e), third indent, of the Directive, in particular as that provision refers also to `other similar services'.

14 Taking the view that an interpretation of Article 9(2)(e), third indent, of the Directive is necessary in order to resolve the dispute before it, the Finanzgericht Rheinland-Pfalz, stayed proceedings and sought a preliminary ruling by the Court on the following question:

`Is Article 9(2)(e) of Title VI of the Sixth EEC Directive (third group: "services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information") to be interpreted as including the services of an

arbitrator?'

15 In order to answer that question, it must first be noted that Article 9(2)(e), third indent, of the Directive does not refer to professions, such as those of lawyers, consultants, accountants or engineers, but to services. The Community legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers.

16 The first question which arises, therefore, is whether the services of an arbitrator fall within the category of those principally and habitually carried out as part of the professions listed in Article 9(2)(e), third indent, of the Directive (Case C-167/95 Linthorst, Pouwels and Scheres v Inspecteur der Belastingdienst/Ondernemingen Roermond [1997] ECR I-0000, paragraphs 18, 22 and 25).

17 In particular, the Community definition of a lawyer does not, in view of the range of services principally and habitually provided in the Member States as part of that profession, cover the services of an arbitrator. Whilst arbitrators are in fact often chosen amongst lawyers by reason of their legal knowledge, the services provided by a lawyer are none the less principally and habitually those of representing or defending the interests of a person, whereas the services of an arbitrator are principally and habitually those of settling a dispute between two or more parties, even though this is done on an equitable basis.

18 For similar reasons, the services of an arbitrator cannot correspond to those of a consultant, engineer, consultancy bureau or accountant. None of the services principally and habitually provided as part of any of those professions concerns the settling of a dispute between two or more parties.

19 It remains to be considered whether the services of an arbitrator fall within the `other similar services' mentioned in Article 9(2)(e), third indent, of the Directive.

20 It is clear from paragraphs 19 to 22 of the judgment in Linthorst, Pouwels and Scheres that the expression `other similar services' does not refer to some common feature of the disparate activities mentioned in Article 9(2)(e), third indent, of the Directive but to services similar to those of each of those activities, viewed separately.

21 A service must be regarded as similar to those of one of the activities mentioned in that provision when they both serve the same purpose.

22 In the context of a lawyer's activities, if negotiation with a view to reaching a settlement - which is the service offered by a lawyer most closely approximating to that offered by an arbitrator - is compared with the settlement of a dispute by an arbitrator, it is clear that the two do not serve the same purpose. Whereas an attempt to reach an agreement by a lawyer taking part in a negotiation is habitually based on expediency and the weighing-up of interests, the settlement of a dispute by an arbitrator is based on considerations of justice or equity.

23 The services of a lawyer and those of an arbitrator cannot, therefore, be regarded as similar.

24 None of the services of a consultant, engineer, consultancy bureau or accountant serve the purpose described above as being that of the services of an arbitrator.

25 Consequently, the services of an arbitrator cannot be regarded as similar to those of any of those professions.

26 In view of all the foregoing, the answer to the question referred for a preliminary ruling must be that, on a proper construction, Article 9(2)(e), third indent, of the Directive does not refer to the services of a member of an arbitration tribunal.

Decision on costs

Costs

27 The costs incurred by the German and United Kingdom 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.

Operative part

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the question referred to it by the Finanzgericht Rheinland-Pfalz, Neustadt an der Weinstrasse, by order of 15 March 1996, hereby rules:

On a proper construction, Article 9(2)(e), third indent, 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 does not refer to the services of a member of an arbitration tribunal.