61994C0327

Opinion of Mr Advocate General Fennelly delivered on 25 April 1996. - Jürgen Dudda v Finanzgericht Bergisch Gladbach. - Reference for a preliminary ruling: Finanzgericht Köln - Germany. - Sixth VAT Directive - Interpretation of Article 9(2)(c) - Sound-engineering for artistic or entertainment events - Place where the services are supplied. - Case C-327/94.

European Court reports 1996 Page I-04595

Opinion of the Advocate-General

++++

Introduction

1 In this preliminary reference, the Court is asked to interpret for the first time the scope of the first indent to Article 9(2)(c) of the Sixth Directive on Value Added Tax (hereinafter `VAT'). The reference poses the question whether the provision of acoustic services for concerts can be regarded as a cultural, artistic, entertainment or similar activity or, in the alternative, as the provision of a service which is ancillary to such an activity.

Factual and legal context

(i) Factual background

2 According to the order for reference, Mr Juergen Dudda, the plaintiff in the main proceedings (hereinafter `the plaintiff'), supplies sound-engineering services within the framework of his one-man business. These services comprise, in particular, the provision of optimum sound levels and sound quality for concerts and similar events. While his business is established in Germany, most of the events for which he provides his services take place abroad.

3 The plaintiff contracts for his work with the organizer of each event. His work normally involves having to attend to the complete sound-engineering arrangements for the event in question. To accomplish this task the plaintiff initially carries out measurements to enable him to determine what equipment is required and how it can be used in order to achieve the optimum sound level and sound quality, or certain sound effects. For certain events, notably the `Klangwolke' (`cloud of sound') projects in 1986, the sound performances had to be coordinated with other effects, such as film, laser displays and fireworks. The plaintiff also gives advice on plans of this kind. Furthermore, the plaintiff supplies the organizer with the equipment which he deems to be necessary, together with the personnel required both to set up and to operate that equipment. Sometimes the equipment belongs to the plaintiff and sometimes it has to be hired from other suppliers. The plaintiff receives a single payment from the organizer for all his services.

4 The tax assessments in dispute in this case relate to the years 1985 and 1986. In those years the plaintiff's (gross) payments in respect of events held abroad (in various European countries including Austria, Italy, Yugoslavia and Denmark) amounted to DM 38 500 (1985) and DM 152 729 (1986). Following a special investigation, the Finanzamt Bergisch Gladbach (hereinafter `the defendant') subjected these payments to VAT pursuant to section 1(1) of the Umsatzsteuergesetz (Turnover Tax Act, hereinafter `the UStG'). The UStG implements in German law the Sixth Council 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 (hereinafter `the Directive'). (1) Following the dismissal of his administrative action against the assessment, the plaintiff brought the present action before the Finanzgericht (Finance Court), Cologne (hereinafter `the national court'), claiming that the turnover from his services supplied in respect of events outside Germany was not taxable under the UStG. (2)

(ii) Community law

5 Title VI of the Directive concerns the `place of taxable transactions'. The reasoning underlying the provisions concerning the place of supply for goods and services is articulated in the seventh recital in the preamble to the Directive as follows:

`Whereas the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between the Member States, in particular as regards supplies of goods for assembly and the supply of services; whereas 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.'

6 Article 9 of the Directive deals with the `supply of services'. Article 9(1) provides the general rule whereby:

`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 for a number of specific cases. The present proceedings directly concern the interpretation of Article 9(2)(c), and in particular the provision in its first indent that:

`the place of the supply of services relating to:

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

(...)

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

Article 9(2)(c) also applies to, inter alia, `ancillary transport activities such as loading, unloading, handling and similar activities' (second indent). Among the other special provisions are:

- Article 9(2)(b), which states that transport services are deemed to be supplied where the transport takes place, having regard to the distances covered;

- Article 9(2)(d), which provides that the service of hiring out of movable tangible property, other than forms of transport, from one Member State for use in another, is deemed to be supplied at the place of utilization; and

- Article 9(2)(e), which provides that when the customer is established outside the Community or is a taxable person established within the Community, a wide range of services, including those of consultants and similar professionals and the supply of staff, and advertising services, is deemed to be supplied at the customer's place of establishment.

8 Article 21 of the Directive, which identifies the persons liable to pay tax to the fiscal authorities, states, in part:

`The following shall be liable to pay value added tax:

1. under the internal system:

(a) taxable persons who carry out taxable transactions other than those referred to in Article 9(2)(e) and carried out by a taxable person resident abroad. When the taxable transaction is effected by a taxable person resident abroad Member States may adopt arrangements whereby tax is payable by someone other than the taxable person residing abroad. Inter alia a tax representative or other person for whom the taxable transaction is carried out may be designated as such other person. The Member States may also provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax;

... .'

(iii) The national proceedings and the order for reference

9 The plaintiff submitted before the national court that the services in question were supplied at the venue of the respective events and not, as alleged, at his place of business in Germany. Section 3a(2)(3)(a) of the UStG states that for `artistic, scientific, educational, sporting, entertainment or similar services, including the services of their respective organizers', the place of supply is the place where the particular service is carried out. (3) The plaintiff submitted that the services he supplied should be classified as `entertainment'. They served directly to entertain the audience at the event, because the entertainment value of the event would have been lost without his services. Any other interpretation of the UStG would be contrary to Article 9(2)(c), first indent, of the Directive. According to the plaintiff, any activity at his business establishment is at most preparatory in nature and of secondary importance. The plaintiff relied, in the alternative, on the provisions of the UStG which correspond to Article 9(2)(d) and (e) of the Directive, arguing that his services included the hiring out of equipment under the former provision, and consultancy services

and the supply of staff under the latter. (4)

10 The defendant submitted before the national court that the provisions of the UStG relied on by the plaintiff were inapplicable in this case. It argued, in particular, that the plaintiff did not perform any artistic or entertainment activities or `similar services' within the meaning of section 3a(2)(3)(a) of the UStG. In its view, such services are only supplied by the persons to whom the plaintiff provides his services, that is, the artists and entertainers and organizers of events. The sound-engineering services supplied by the plaintiff are purely technical in nature: the Community legislature could not have intended services which render the sound source audible to be regarded as a `similar' service within the meaning of Article 9(2)(c), first indent, of the Directive. With regard to the plaintiff's alternative argument, the defendant asserted that his obligation was not the piecemeal provision of the various services mentioned, but the provision of a complete service of sound reproduction, which was not governed by any of the exceptional provisions invoked.

11 The national court sets out in detail the reasons which led it to make a reference. It is of the view that the plaintiff's supplies cannot be regarded as `artistic' or `entertainment' services. It refers to academic commentaries on the use in the UStG of the term `artistic' or `entertainment' activity, which list actors, musicians, singers, performers, entertainers, conductors, quiz masters and members of similar professions as `artists', while classifying as `entertainment' the activities of entertainers, compères, cabaret singers, pop singers, variety artists and circus performers. It believes that the plaintiff's activities cannot be so classified because they merely create the technical conditions in which the artistic or entertainment activities of other persons can achieve their full effect. The national court does state, however, that the plaintiff's work involves `a high degree of artistic expertise and intuitive understanding' of acoustic conditions and of `the overall artistic concept of the project in question'.

12 Furthermore, in so far as `similar' services are concerned, the national court views the decisive criterion under the UStG as being the personal nature of the service provided: the provision concerns suppliers who can easily move their central management to low-tax locations, because their services consist essentially in applying and realizing their personal qualities, knowledge or skills. Suppliers who rely on certain geographical factors, the availability of regular employees or the use of their own technical aids would, on the other hand, be excluded. The national court considered the plaintiff to fall into the latter category, due to his commitments in respect of the provision of equipment and staff, for which a permanent business address was essential.

13 The national court, however, believes that a different assessment may result from the application of Article 9(2)(c), first indent, of the Directive. In particular, the national court feels that the reference to `the supply of ancillary services' in that provision may dictate a different tax assessment of the plaintiff's services from that under the UStG, read on its own. It recognizes, thus, the possibility that Article 9(2)(c), first indent, covers services by third parties which are `ancillary' to the artistic, entertainment or similar activity and that such an interpretation would override section 3a(1) of the UStG. (5) In this regard, the national court finds that `the plaintiff's services are not only a necessary prerequisite for the respective artistic performance or entertainment, but are by their very nature arranged precisely so as to realise that performance in the most effective manner'. In the absence of any detailed examination of the proper interpretation of `ancillary services' for the purpose of Article 9(2)(c), first indent, of the Directive in either case-law or academic writings, it decided on 17 October 1994 to refer the following questions to the Court: (6)

`(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 EEC 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?'

The national court decided to defer consideration of questions arising from the provisions of the UStG corresponding to Article 9(2)(d) and (e) of the Directive.

Observations submitted to the Court

14 Written observations were submitted by the German and Italian Governments and by the Commission. By letter of 15 March 1995, the defendant opted not to submit any observations but associated itself with those to be submitted by the German Government. The German Government and the Commission also presented oral observations at the hearing on 7 March 1996. Their observations may be summarized as follows.

The German Government

15 The German Government refers to the legislative history of Article 9 of the Directive. Noting that the Commission's proposal of 29 June 1973 (7) would have taxed the supply of services exclusively at the place of establishment of the supplier, the Government submits that a number of exceptions to this general rule were introduced during the legislative process because of fears that distortions of competition would arise if providers of certain services were able to alter the tax regime applicable to them simply by moving their place of establishment. This was acknowledged in the judgment of the Court in Trans Tirreno Express v Ufficio Provinciale IVA. (8) Accordingly, the Government submits that Article 9(2), as a derogation from the general rule (the `Grundregel') expressed in Article 9(1), should be interpreted strictly. Whenever doubts arise as to the classification of an activity within the scope of the derogating provision, the general rule should be applied. It avers that this conclusion conforms with the conception of Article 9(1) endorsed by the Court in Berkholz v Finanzamt Hamburg-Mitte-Altstadt. (9)

16 For the sound-engineering service at issue in the main proceedings to be regarded as coming within the scope of Article 9(2)(c), first indent, of the Directive, the German Government takes the view that it must be capable of being classified as: (i) artistic; (ii) entertainment; (iii) an activity similar to an artistic or entertainment activity; or (iv) coming within the reference in that provision to `where appropriate, the supply of ancillary services' to such artistic or entertainment activities. It notes that these provisions have not yet been interpreted by the Court and, so, refers to the German academic writings mentioned by the national court in its order for reference. (10) It also refers to a decision of the German Bundesverfassungsgericht (Federal Constitutional Court), according to which the essence of an artistic service comprises a liberal creation within which impressions, experiences and elements perceived by the artist are brought directly to the attention of the audience by means of a certain method of expression. (11) Entertainment services are those which satisfy less rigorous criteria; namely, those services which serve to amuse a large section of the population without meeting artistic criteria. In the Government's opinion, these definitions may be used in the interpretation of the Directive because the terms at issue are not susceptible of a special definition within the framework of Community law.

17 Applying these definitions to the services provided by the plaintiff, the German Government submits that they cannot be classified as either artistic or entertainment because they merely serve to create the technical conditions which permit the expression of the relevant artistic or

entertainment activity. Nor can they be regarded as `similar' to an artistic or entertainment activity. Only services which are comparable to artistic services can be regarded as `similar' for the purposes of Article 9(2)(c), first indent: it must be something essentially personal, capable of being provided at various locations and which does not depend on the place of establishment of the provider. This is not the case with the provision of technical equipment and operative personnel, such as in the case of the plaintiff's activities: his activities can be equated with the provision to a musician of a recording studio and personnel, which a large majority of the representatives in the VAT Advisory Committee considered to be governed by Article 9(1) of the Directive. (12)

18 With regard to whether the plaintiff's services can be considered to be ancillary to artistic or entertainment services, the German Government submits that this calls for a close examination of the wording of Article 9(2)(c), first indent, of the Directive. In its opinion, the words `... and where appropriate, the supply of ancillary services' can only be interpreted as referring to services, other than the principal service, which are provided by the provider of the principal service. This interpretation would cover all services of an ancillary character provided by the relevant artist or entertainer, rather than services which are ancillary to the provision of the relevant artistic or entertainment service. According to the Government, while the wording of Article 9(2)(c), first indent, is not unambiguous in this respect, it is only this narrower interpretation which would accord with the objective of the provision of allowing artists and entertainers to have a single location for VAT purposes for all services, principal and ancillary, which they provide in the context of each performance. This would have the merit of simplicity for all involved, including Member State fiscal administrations. However, in response to questions from the Court at the oral hearing, the German Government had difficulty in indicating the sorts of ancillary services that might be provided by persons engaged in artistic, entertainment, sporting and other activities governed by Article 9(2)(c), first indent. (13) On the other hand, the German Government submitted that, if the wider view of the provision were retained, it would be difficult to limit the scope of the exception to the general rule - it might extend to services minimally connected with the principal artistic or other event, such as those of hotels or restaurants, as well as to the more directly-related services of stage-builders, bodyguards, make-up artists, and so on. Furthermore, the reference to the words `where appropriate' (`sowie gegebenfalls' in the German version and `le cas échéant' in the French version) would be superfluous if almost any activity ancillary to (inter alia) an artistic performance were covered by Article 9(2)(c), first indent. Given the doubts as to the classification within Article 9(2)(c) of the plaintiff's activities, the general rule expressed in Article 9(1) should be applied.

19 The German Government also expressed its concern about the possibility of tax evasion if Article 9(2)(c), first indent, were to be read widely, due to the difficulty in keeping track of the provision of services at a variety of locations. There was no evidence that the plaintiff had actually paid VAT in the various Member States where the concerts in question took place. It would be simpler for turnover tax to be collected by the fiscal authorities of the State of establishment of service-providers such as the plaintiff.

20 In so far as the second question is concerned, the German Government does not consider that the fact that a service-provider may have to synchronize sound effects with optical effects can have any bearing on the proper classification of the activity in question within the scope of Article 9(1) of the Directive.

The Italian Government

21 The Italian Government initially observes that the question has not been appropriately worded. Article 9(2)(c), first indent, of the Directive is not concerned with the artistic, entertainment or other characteristics, as such, of services. On the contrary, according to the Government, the provision gives Member States a wide discretionary power to determine the particular services which can be assimilated to artistic services: in the light of the heterogeneity of the services involved, the Community legislature could not otherwise have regulated the situation. The Italian Government

proposes that the Court respond to the question referred to the effect that it is for the national legislatures to determine the services that can be regarded as accessory to artistic services for VAT purposes.

The Commission

22 The Commission points out, by way of introduction, that Article 9(2)(c), first indent, of the Directive is a rule designed to resolve conflicts concerning the place of supply of services and, thus, to delimit the respective competences of Member States. The terms used are Community-law terms, which must be uniformly interpreted so as to avoid instances of double and non-taxation resulting from divergent national interpretations. (14) Paragraphs (1) and (2) of Article 9 of the Directive should not be seen as setting out a general rule subject to specified exceptions. They have a shared object: to specify the place of supply of services. Paragraph (2) should therefore be seen as providing a lex specialis in respect of the various specialized services to which it applies, with paragraph (1) providing a residual lex generalis. Thus, a deliberate policy of reading Article 9(2) in a restrictive fashion would be mistaken.

23 The Commission submits that the questions referred by the national court can only be answered in the affirmative. Given that the terms `cultural', `artistic' and `entertainment' activities are all found in Article 9(2)(c), first indent, of the Directive, without any distinction being drawn between them, the Commission submits that no particular artistic or cultural level is required. The Commission draws further support for this view from the fact that even `similar' activities are considered sufficient. According to the Commission, the legal consequences of being classified as independent cultural, artistic or entertainment activities or of being classified as `similar' or `ancillary' activities are the same. While it cannot be excluded that sound-engineering and lighting services carried out within the context of the preparation for performances may constitute cultural, artistic or entertainment activities in their own right, (15) the Commission nevertheless supports the argument, raised by the national court in its order for reference, that, given both the close connection with and purpose of the services at issue (of rendering more effective the connected artistic or entertainment activity), they should at least be considered as `ancillary' activities. The Commission, thus, concludes that the services described by the national court fall within the scope of Article 9(2)(c), first indent. This conclusion applies equally where those services are combined with the provision of optical effects such as those described in the second question.

24 In response to questions from the Court at the oral hearing, the Commission stated that the case did not concern attempted avoidance through reliance on Article 9(2) of the Directive, against which Articles 21 and 22(7) provide safeguards which are operable through cooperation between Member State fiscal administrations.

Consideration of the questions referred to the Court

25 I will first make some preliminary remarks about the correct approach to the interpretation of Article 9(2) of the Directive. These will concern: (i) its relationship with the general rule set out in Article 9(1); and (ii) the purported discretion of national fiscal authorities and courts regarding the construction of its terms.

(i) Article 9(1) and (2) of the Directive

26 The Court has stated on a number of occasions that paragraph (2) provides for derogations, (16) or exceptions, (17) to a rule of general application, stated in Article 9(1) of the Directive. While the description of Article 9(2) in such terms is asserted by the German Government to imply that it should be strictly construed, the Court has never expressly adopted this approach. The Court has also spoken of the two paragraphs of Article 9 of the Directive in terms which do not give rise to any such implication.

27 In Berkholz, the Court stated:

`Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whilst 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.' (18)

28 In Hamann, the Court interpreted Article 9(2)(d) of the Directive in the light of its objects, in particular those of preventing distortions of competition arising from the different VAT rates applied by the Member States, and of the practical need (if VAT were to be collected) for a regime for the hiring out of forms of transport different from that applied to other equipment hire. There is no intimation of the priority, as a matter of interpretative principle, of the first paragraph over the second. On the contrary, the Court indicated that no particular argument of principle supports the general rule in Article 9(1) against the more sector-specific provisions of Article 9(2): the general rule was adopted, it said, `for the sake of simplification'; (19) however, other practical considerations, such as those just mentioned, (20) may necessitate alternatives in certain cases. The Court's silence on the subject of restrictive interpretation in Hamann may be contrasted with the approach of Advocate General Jacobs, which may be thought to have been implicitly rejected: he recommended the result ultimately reached by the Court, and based his Opinion primarily on the objects of Article 9(2) (on which he and the Court were also ad idem), but stated, `[m]oreover', that `any derogation from the directive must be interpreted restrictively, which points here [as the case concerned an exception to a derogation] to a broad interpretation of the term in issue'. (21)

29 In the Advertising Cases, the Court spoke of the Article as a whole as `a rule of conflict which determines the place of taxation of advertising services and, consequently, delimits the powers of the Member States'. (22) In those cases, Advocate General Gulmann expressly rejected a restricted (and linguistically tenable) interpretation of the ambiguous term `advertising services' in Article 9(2)(e) of the Directive in favour of a wider (and equally tenable) interpretation, in the light of the objects of the provision. (23) Both he and the Court identified those objects from the seventh recital in the preamble to the Directive, which speaks of a special regime where the cost of services supplied between taxable persons is included in the price of goods.

30 The Court also read Article 9(2)(b) of the Directive in the light of its objects in Trans Tirreno Express, on the practical basis that transport services were a case `where the fiction that the services are supplied at the supplier's place of establishment is inappropriate'. (24) Transport services, which are liable to be effected on the territory of more than one Member State, require `a different criterion, which essentially must make it possible to determine the jurisdiction of each of the States involved for tax purposes'. (25) The language of the Court in this case, as well as in the Advertising Cases and in Hamann, tends to affirm the independent value of Article 9(2), alongside Article 9(1), in achieving the objects of the VAT regime. This could be undermined by the automatic application of Article 9(1) of the Directive in cases of doubt. The Court did not suggest otherwise in Berkholz, when it stated that `[a]ccording to Article 9(1), the place where the supplier has established his business is a primary point of reference', as it was concerned in that case only with the relative merits of two possible places of supply provided for in that paragraph, namely, the place of establishment of the supplier, and a fixed establishment from which the service is supplied. (26)

31 I conclude, therefore, that the provisions of Article 9(2) of the Directive should be read in the light of their objects. A narrow reading of its terms should not be favoured over a wider, equally tenable interpretation, if the latter is more consistent with those objects. This position can be contrasted with that relating to exemptions from the VAT regime under Article 13 of the Directive. These `are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person'. (27) Article 9, on the other hand, concerns only the allocation of the place of taxation, and, to the extent possible, it will be read in order to ensure, inter alia, that taxable transactions do not escape taxation due to impractical allocations of tax jurisdiction.

(ii) Member State discretion

32 I also wish to comment on the contention of the German and Italian Governments that Member States have a discretion with regard to the definition of the various categories of services mentioned in Article 9(2)(c), first indent, of the Directive. This contention does not appear to me to be sustainable. Differences between Member States about the categorization of particular activities could lead to conflicts of jurisdiction between Member States (or to denial of jurisdiction by Member States), contrary to the very purpose of Article 9 of the Directive. The Court stated in the Advertising Cases `that "advertising services" is a Community concept which must be interpreted uniformly in order to avoid instances of double taxation or non-taxation which may result from conflicting interpretations'. (28) The same reasoning applies to the provisions of Article 9(2)(c), first indent, of the Directive, which must also receive a Community interpretation from the Court. The principle of legal certainty also dictates a uniform Community interpretation. This principle applies with particular rigour to rules which have fiscal consequences, so that individuals can identify their obligations under such rules. (29)

33 This concludes my preliminary remarks. I will now turn to the substantive analysis of the applicable law.

34 A plausible case may be made for the description of some of the plaintiff's activities, in the context of musical events, as being artistic or entertainment. When he operates, or guides the operation of equipment to achieve optimum sound level and sound quality, and to coordinate sound and visual effects, he may (as the agent for the Commission suggested) be compared to a record producer. While the instruments he employs are technical in nature, and presumably demand considerable technical expertise, his role in managing the presentation of the musical event may even (depending on the level of discretion he enjoys) share certain features with the role of an orchestra conductor or a stage director. (30) It requires in the words of the national court, `a high degree of artistic expertise and intuitive understanding'.

35 However, it is clear that it would stretch intolerably the language of the Directive to describe as artistic or entertainment activities the plaintiff's preparations for the sound-reproduction of musical events and the arrangements for the supply of staff and equipment. As he concludes a single contract with event organizers, for the supply of all his services for a single price, it would run contrary to the interests in simplicity of administration and ease of collection (and prevention of tax-avoidance) which the Court has identified as relevant factors when interpreting Article 9 of the Directive to seek unnecessarily to separate the various elements of the plaintiff's business, in order to define for each one a distinct place of supply. I reserve my position on whether this can ever be necessary, or possible (for example, in cases where the various elements of a service for which a single price is charged would, taken individually, fall under different regimes). (31) Such a process of distinction is not necessary in the present case. It is true that the national court intimated that some elements of the plaintiff's service might fall under Article 9(2)(d) and (e) of the Directive. None the less, where a service composed of several elements falls in its entirety within the scope of one provision of Article 9(2) of the Directive (as is argued in the present case), the practical interest in simplicity of administration and collection dictates that the categorization of more general scope should be preferred.

36 If the plaintiff's preparatory activities and his arrangements for the supply of staff and equipment can be defined as services ancillary to the supply of artistic, entertainment or similar activities, then so too can his services in operating that equipment, and in coordinating sound and visual effects. If the latter are not artistic or entertainment, they would still fall within the scope of Article 9(2)(c), first indent, of the Directive. Indeed, it can also be plausibly argued, contrary to the argument presented in the paragraph immediately above (but consistently with the view of the national court), that the dependence of the plaintiff's more creative work on the generation by the principal artists or entertainers of music, which he reproduces, indicates that this aspect of his service is better examined in the same context as his more technical services. In my view, therefore, the interpretation of the term `ancillary services' in Article 9(2)(c), first indent, of the Directive is central to the resolution of the present case. (32)

37 The national court is, I think, correct in its identification of the purpose underlying the creation of a special regime for artistic, entertainment and other similar activities under Article 9(2)(c), first indent, of the Directive. As I have already indicated above, the national court viewed the personal nature of the service provided as a criterion for the definition of `similar activity'. Suppliers of services consisting essentially of the application and realization of personal qualities, knowledge or skills could easily move their central management to low-tax locations if their services were not deemed to be supplied at the place where those services are physically carried out. Therefore, the plaintiff cannot be deemed to supply a service similar to artistic, entertainment, sporting or other services expressly identified in the provision, because his business is not as mobile as is typical of artists, entertainers and sporting professionals. While he provides his services at a number of different locations, he relies for at least part of the service he provides on geographical factors, the availability of regular employees and the use of his own technical aids, for which a permanent business establishment is essential.

38 An `ancillary service' is ordinarily understood, in English, to provide essential support to, or to be subordinate or subservient to, a central service or industry. (33) The aspect of subservience appears to predominate in the definition of the French term `accessoire', although it can also indicate that a service so described is essential to, because it completes, a principal service. (34) The German term `zusammenhaengenden' also suggests dependence. It has not been suggested that any of the other language versions gives rise to a different possible construction. The plaintiff's services, to which the present case refers, comply with both meanings of the terms `ancillary' and `accessoire': they provide an essential and direct support to the staging of musical events, and they are dependent in the sense that they are only useful in the context of the staging of such events. The question remains whether it would be `appropriate', consistently with the objects of Article 9(2)(c), first indent, of the Directive, to define the plaintiff's services as `ancillary services' for the purposes of that provision.

39 The German Government argues that the object of preventing distortion of competition through the tax avoidance of highly mobile service-providers should also dictate the interpretation of `ancillary services', the inclusion of which in Article 9(2)(c), first indent, is qualified by the condition `where appropriate'. Thus, it submits that the term `ancillary' should be understood as relating to the provider of the principal service and not to the principal service as such. This interpretation would cover all services of an ancillary character provided by the relevant artist or entertainer, rather than all services which are ancillary to the provision of the relevant artistic or entertainment service. This would prevent the over-extensive application of Article 9(2)(c), first indent, and would ensure simplicity in the VAT affairs of the artists and entertainers involved.

40 I am not convinced by this argument, for three related reasons: it is contrary to the literal understanding of the legislative text; it requires either that part of the legislative text be treated as superfluous, or that it be interpreted inconsistently with its professed objective; and it is contrary to the wider objects of Article 9(2) of the Directive. First, the German Government's argument is linguistically implausible. Article 9(2)(c), first indent, refers to a variety of service activities, rather than to persons engaged in those service activities. It seems more logical, therefore, to read `ancillary services' as being services ancillary to those activities, rather than as being restricted to additional activities of the service-providers engaged in those principal activities. I would not exclude from the definition additional services from the main service-provider merely because the examples proffered in the course of the present proceedings are unconvincing. (35) However, such services should be `ancillary' in the sense of directly supporting that service.

41 Secondly, the German Government's argument for the interpretation of the entirety of Article 9(2)(c), first indent, of the Directive, including the reference to `ancillary services', solely in the light of the object of preventing distortions of competition through the relocation of highly mobile providers of essentially personal services gives rise to anomalies. If the additional services

provided by peripatetic artists, entertainers and others specified in the provision are also personal in nature, and thus highly mobile (as is the case in respect of promotional activities), they should, on this view, be defined as `similar activities', so that the additional reference to `ancillary services' is otiose. If, on the other hand, these additional services are not essentially personal and mobile in nature, and require a stable establishment, it would defeat the central (and exclusive) object of the provision contended for by the German Government if they were to come within its scope.

42 Thirdly, I think that a wider view of the objects of Article 9(2)(c), first indent, of the Directive is necessary, in the light of the overall function of Article 9(2) of producing more rational results in specified instances than would result from the application of the fiction in Article 9(1) of the Directive. This view is also dictated by the failure, described immediately above, of a more narrowly defined object to give rise to a rational construction of the provision as a whole. Furthermore, any argument for the exclusive application of the provision to service-providers capable of unencumbered mobility is undermined by the fact that the organizers of the principal activities governed by Article 9(2)(c), first indent, of the Directive are expressly included within its scope, despite the fact that they may be burdened (especially if operating on a large scale) with fixed establishments in places other than those where they organize and present events. (36) Ancillary services may be ancillary to those of the organizer as well as to those of artists and entertainers. This would strengthen the case for the identification of a wider object which could include such supporting services within its remit.

43 Artistic, entertainment, cultural and sporting services are consumed, in large part, by members of the public who are not taxable persons. (37) These services tend, however, to be purchased through an intermediary, the event organizer, who will arrange the venue, publicity, performers and (crucially for the provision of services for consideration) ticket sales. (38) They will normally be directly consumed at the place of provision, through the simple fact of the presence of the consumer at the performance (although broadcast links may also permit consumption in other places, including other Member States). (39) Through the medium of ticket purchase, the consumer pays a single price for the service. This single price pays not just for the service of the performer, but also for ticket distribution, advertising, insurance and venue hire, and for all the technical services essential to the running of the event (services which fall within the literal meaning of the term `ancillary').

44 The overall aim of Article 9(2) is to establish a special regime for allocation of the place of supply of services `where the cost of the services is included in the price of the goods'. (40) The Court has indicated that the same approach should apply where the cost of services is included in the price of a downstream service, as is indicated in the quotation immediately below. If artistic or entertainment services are provided to the public through the services of an event organizer, and by their nature are physically provided at the place of consumption, it seems logical that these inputs into a downstream service provided to the public at that place be subjected to a single VAT regime and, to the greatest extent possible, to a uniform rate of turnover tax at the point of provision, which will also be the rate applied to the final consumption of the downstream service by its consumers. This is the logic underlying Article 9(2)(e) of the Directive, as interpreted by the Court in the Advertising Cases: `The Community legislature therefore considered that, in so far as the person to whom the services are supplied customarily sells the goods or supplies the services advertised in the State where he has his principal place of business, and charges the corresponding VAT to the final consumer, the VAT based on the advertising service should itself be paid by that person to that State'. (41) This contributes to simplicity of administration for both the taxpayer and the fiscal authorities. (42)

45 As regards administration of turnover tax in the place where the principal artistic or entertainment service is performed, the organizer, as the intermediary between the providers of input services and the public, can probably also assume the role of `a tax representative or other person for whom the taxable transaction is carried out' where Member States `adopt arrangements

whereby tax is payable by someone other than the taxable person residing abroad' under Article 21 of the Directive, as he will be responsible under Article 9(2)(c), first indent, in any event, for the payment of turnover tax on his own service and on ticket sales effected by him.

46 This analysis should, at least, apply where the essential support services for the event in question share in the mobility of the principal artists and entertainers. By this I mean that, even if they require a fixed establishment in one place for logistical purposes, as such services are not as intrinsically personal as those of the principal service-providers, the service in question (with the exception of preparatory or incidental matters) is physically provided at the place where the principal event occurs and is `consumed'. Furthermore, the plaintiff's services conform to a relatively narrow definition of what is ancillary, as they are directly, physically necessary to the presentation of the artistic or entertainment events to which they relate. (43) As the national court observed, `the plaintiff's services are not only a necessary prerequisite for the respective artistic performance or entertainment, but are by their very nature arranged precisely so as to realize that performance in the most effective manner'. It is, I think, `appropriate', within the meaning of Article 9(2)(c), first indent, of the Directive, to treat such essential and relatively mobile support services as `ancillary services' which are deemed to be supplied at the place where they are physically carried out.

47 It is not necessary, for the purposes of the present case, to examine the appropriateness of extending the scope of Article 9(2)(c), first indent, of the Directive to providers of essential services which are entirely carried out at places other than the place of performance of the principal artistic or other service, or at only one place. Furthermore, I am mindful of the concern of the German Government that `ancillary services' should not be so defined to have virtually unlimited scope. It mentioned, in its written pleadings, the possibility of inclusion within the scope of the provision of hotels and restaurants, (44) and, in its oral observations, the examples of stage-builders, make-up artists, security services and bodyguards. It is not necessary for me to address directly the position of these services. As regards some of these examples, suffice it to say that a wider definition of ancillary services than is necessary in the instant case would be required to extend the scope of the provision to include services which may be economically necessary to the running of the event (for example, through special arrangements with providers of accommodation, travel, and other services, or through the franchising of souvenir products and `fringe' events) but which do not contribute physically and directly to the actual staging of the principal event.

48 As was indicated above, (45) section 3a(2)(3)(a) of the UStG does not reproduce the reference to ancillary services in Article 9(2)(c), first indent, of the Directive. However, the national court stated in the order for reference that if the plaintiff's services were deemed to fall within the scope of the latter provision, the rules of the Directive would override section 3a(1) of the UStG (which corresponds to Article 9(1) of the Directive), and the contested turnover would not be taxable in Germany. In the light of this acknowledgement, there is no need to consider further the interpretative obligations of national courts in the case of such lacunae. (46)

Conclusion

49 I conclude that the questions referred by the national court should be answered as follows:

A person who, at artistic or entertainment events at a number of different locations, carries out the sound-engineering of the performance, where his services are a necessary prerequisite to the performance, supplies an ancillary service within the meaning of Article 9(2)(c), first indent, of the Sixth Council 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.

This conclusion applies where the service in question 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, as well as where it

consists, in addition, in coordinating the sound effects to be produced with his assistance with certain visual effects produced by other persons.

(1) - OJ 1977 L 145, p. 1.

(2) - The defendant altered its statement of the plaintiff's tax liability during the course of the proceedings before the national court, and the plaintiff changed his pleadings accordingly, but this does not affect the present reference.

(3) - Section 3a(2)(3)(a) of the UStG does not reproduce the reference to ancillary services in Article 9(2)(c), first indent, of the Directive.

(4) - The corresponding provisions of the UStG are section 3a(3), read with section 3a(4)(11) (in the case of Article 9(2)(d) of the Directive) and with section 3a(4)(3) and (7) (in the case of the relevant indents to Article 9(2)(e) of the Directive). The UStG appears to differ from Article 9(2)(d) of the Directive, as the place of supply of the relevant service is stated in section 3a(3) of the UStG to be the place of establishment of customers who are established outside the Community or who are taxable persons established within the Community, rather than the place of utilization of equipment which is hired for use in another Member State. On the basis of the provisions of the UStG, the plaintiff pointed out that the organizer of only one of the events in question was established in Germany, and argued that he was, at most, liable to tax in Germany on the turnover from his services in respect of that event.

(5) - This section corresponds to Article 9(1) of the Directive.

(6) - The reference was registered with the registry of the Court on 12 December 1994.

(7) - OJ 1973 C 80, p. 1.

(8) - Case 283/84 [1986] ECR 231.

(9) - Case 168/84 [1985] ECR 2251.

(10) - See paragraph 11 above.

(11) - Although not cited, this appears to be drawn from the decision in (1971) 30 BVerfGE 173.

(12) - The Committee is established pursuant to Article 29 of the Directive. It expressed the opinion in question at its 24th meeting, on 14-15 November 1988 (XXI/1653/88 Final).

(13) - The two examples offered were the giving of autographs (which is rarely, if ever, a commercial activity) and the promotion of goods, for example of tennis racquets by a tennis-player (which may fit more easily into the distinct category of advertising services under Article 9(2)(e), second indent, of the Directive).

(14) - The Commission cites the judgments of the Court in Case C-68/92 Commission v France [1993] ECR I-5881, Case C-69/92 Commission v Luxembourg [1993] ECR I-5907 and Case C-73/92 Commission v Spain [1993] ECR I-5997 (hereinafter `the Advertising Cases') in support of this submission.

(15) - The agent for the Commission submitted at the oral hearing that at least some of the plaintiff's activities might be considered to be artistic or entertainment, by analogy with the skill required of, and the status normally accorded to, inter alia, record producers.

(16) - See Trans Tirreno Express, cited in footnote 8 above, paragraph 16 of the judgment.

(17) - Trans Tirreno Express, cited in footnote 8 above, paragraph 17 of the judgment; Case 51/88 Hamann v Finanzamt Hamburg-Eimsbuettel [1989] ECR 767, paragraph 17.

(18) - Cited in footnote 9 above, paragraph 14 of the judgment.

(19) - Cited in footnote 17 above, paragraph 17 of the judgment.

(20) - The need to prevent distortion of competition, and the interest in ease and reliability of collection.

(21) - Paragraph 13 of his Opinion.

(22) - Cited in footnote 14 above: France, paragraph 14 of the judgment; Luxembourg, paragraph 15; Spain, paragraph 12.

(23) - Paragraphs 14 and 19 of his joint Opinion.

(24) - Cited in footnote 8 above, paragraph 16 of the judgment.

(25) - Paragraph 17 of the judgment. Furthermore, the Court implicitly rejected (as Advocate General Sir Gordon Slynn did expressly, at p. 235 of his Opinion) the argument of the Commission for a narrow reading of Article 9(2)(b) of the Directive as applying only to the transport of passengers (see paragraph 11 of the judgment).

(26) - Cited in footnote 9 above, paragraph 17 of the judgment. The Court continued: `[R]egard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State.'

(27) - Case 348/87 Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën [1989] ECR 1737, paragraph 13 of the judgment.

(28) - Cited in footnote 14 above: France, paragraph 14 of the judgment; Luxembourg, paragraph 15; Spain, paragraph 12.

(29) - See Case C-30/89 Commission v France [1990] ECR I-691, paragraph 23 of the judgment; see also the Opinion of 1 February 1996 of Advocate General Cosmas in Case C-231/94 Faaborg-Gelting Linien A/S v Finanzamt Flensburg, paragraph 12.

(30) - Many artistic or entertainment activities demand technical skill as well as creative judgment, the expression of which is served by such skill.

(31) - Where a transaction has a number of elements, which taken individually might fall under different provisions of the VAT regime, the better course may be to subsume the secondary elements into the principal (if the various elements can be so distinguished). This was the course recommended by Advocate General Cosmas in paragraph 14 of his Opinion in Faaborg-Gelting Linien, cited in footnote 29 above, in which he considered the `service' aspects of a ship-board restaurant service to have priority over the `goods' aspect.

(32) - It will emerge in the analysis that follows why I do not attach the same significance to the term `similar activities' in the provision in question.

(33) - This definition of the English term `ancillary' is taken from The Concise Oxford Dictionary 9th ed. (Oxford, 1995). The term has on occasion been construed as referring to matters which are

more remote from a principal activity, and which are not necessary thereto. However, this has occurred in circumstances where legislation refers to matters `ancillary or incidental' to the principal activity: see Stroud's Judicial Dictionary 4th ed. (London, 1971), p. 130 (emphasis added).

(34) - G. Cornu, Vocabulaire juridique 2nd ed. (Paris, 1990), defines as `accessoire' something `qui est lié à un élément principal, mais distinct et placé sous la dépendance de celui-ci, soit qu'il le complète, soit qu'il n'existe que par lui'.

(35) - See footnote 13 above.

(36) - This appears to be the case in respect of the organizer of one of the events to which the plaintiff contributed, who was established in Germany although the event took place elsewhere. See footnote 4 above.

(37) - This is less true, I think, of educational services, and probably much less so of scientific services. However, I do not seek to set out a comprehensive analysis of all the objects served by the provision in question; I am concerned only with those which are relevant to the present case.

(38) - I omit for present purposes the possibility that the mounting of an artistic or other event is partially funded by sponsorship, franchise or advertising revenues. Such transactions may be better governed by the provision on `advertising services' in Article 9(2)(e), second indent, of the Directive, which, as we have seen, is widely interpreted. Such financial support should not, in any event, undermine the description of how artistic or other services are provided to the public for gain (provided some entry charge is paid).

(39) - Where an event is broadcast, even in the case of `pay-per-view' broadcasts, it is the broadcaster who will pay the organizer for the right to transmit coverage of the event. I do not examine here the question of where the broadcasting of services governed by Article 9(2)(c), first indent, of the Directive is deemed to occur. I also exclude from the present analysis questions arising from the provision of artistic or entertainment services for recording purposes, which services are ultimately consumed by the public only after the distribution of discs, cassettes or other media which can be classified as goods for the purpose of turnover tax.

(40) - Seventh recital in the preamble to the Directive.

(41) - Cited in footnote 14 above: France, paragraph 15 of the judgment; Luxembourg, paragraph 16; Spain, paragraph 13. Emphasis added, to highlight the applicability of the principle to downstream services as well as goods. The principle actually operates more clearly under Article 9(2)(c), first indent, of the Directive than under Article 9(2)(e), as the principal and appropriate ancillary input services will always be taxed at the place of provision and consumption.

(42) - Advocate General Gulmann highlighted these kinds of considerations in paragraph 20 of his Opinion in the Advertising Cases: `There is also a more practical reason for preferring this interpretation of the term "advertising services". It prevents advertising agencies from dividing up the invoices which they send to their clients into, on the one hand, those relating to advertising services in the narrow sense and on which VAT is payable in the client's country of residence, and, on the other, those which are not regarded as relating to advertising services and on which VAT is payable in the advertising agency's own country of residence.' The problem was exacerbated in that case because the recipient of an agency's services which were not defined as advertising services was not able in all cases to obtain reimbursement of VAT paid in respect of them in another Member State.

(43) - The reference in the English version of Article 9(2)(c), second indent, to `ancillary transport services, such as loading, unloading, handling and similar activities' supports the classification as

`ancillary' of activities which provide a direct, physical support to the principal service. However, not all language versions use the same terms in both cases; for example, the German version employs the term `zusammenhaengenden Taetigkeiten' in the first indent of Article 9(2)(c) of the Directive, and `Nebentaetigkeiten' in the second. On the other hand, the French version uses the term `accessoire' in both cases. The inclusion of the plaintiff's entire service within the scope of Article 9(2)(c), first indent, of the Directive is also reinforced by the fact that a number of its individual elements, such as the hiring out of equipment and the supply of staff, would be subject, if undertaken alone, to other special arrangements under Article 9(2), paragraphs (d) and (e) respectively.

(44) - As these presumably have a fixed establishment from which their services are supplied at the place where the artistic or entertainment event takes place, the application of Article 9(1) and Article 9(2)(c), first indent, of the Directive should have precisely the same effect.

(45) - See footnote 3 above.

(46) - See generally Case 14/83 Von Colson v Land Nordrhein-Westfalen [1984] ECR 1891; Case C-106/89 Marleasing v La Comercial Internacional de Alimentacion [1990] ECR I-4135.