|

61996C0145

Opinion of Mr Advocate General Fennelly delivered on 24 April 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.

European Court reports 1997 Page I-04857

Opinion of the Advocate-General

1 This preliminary reference concerns the payment of VAT on arbitrators' fees. Are they taxable in the arbitrator's home Member State, in that of the arbitral tribunal which pays him, or in that (or those) of the parties to the arbitration? This issue turns on the interpretation of Article 9(2)(e) of the Sixth VAT Directive. (1) In particular, are the arbitrator's services those of `consultants' or `lawyers', or are they `other similar services'?

I - Legal and factual context

A - Proceedings before the national court

2 The plaintiff in the main proceedings (hereinafter `the plaintiff'), Professor von Hoffmann, is Professor of Civil Law at the University of Trier, Germany. During the years 1987, 1988 and 1989 he served as an arbitrator at the International Chamber of Commerce (hereinafter `the ICC'), which is based in Paris. He was a member of a number of international arbitration tribunals which settled disputes between commercial undertakings by means of arbitration decisions or which sought to bring the parties to a settlement. Such tribunals are composed of three arbitrators appointed for each individual case; the chairman is designated by the ICC; his two colleagues are nominated by the parties and confirmed by the ICC. The proceedings of the arbitral tribunals and the pronouncement of their awards all took place in Paris. The parties to the arbitrations all had their places of business outside Germany. (2) Fees, and their distribution among the members of the tribunal, are determined by the ICC. The members of the tribunal receive payment not from the parties but through the ICC.

3 The Finanzamt Trier (Tax Office, hereinafter `the defendant') claimed VAT from the plaintiff on the fees paid to him by the ICC. His objections were rejected as unfounded. He appealed to the Finanzgericht Rheinland-Pfalz (Finance Court, Rhineland-Palatinate, hereinafter `the national court'), which determined, firstly, that the plaintiff, in acting as an arbitrator, was a supplier of services in the pursuit of an independent occupation and, moreover, that the services were provided to the ICC. (3)

4 The real issue in the view of the national court was `whether the services [were] supplied in Germany or abroad'. The debate before it turned, inter alia, on whether the services were scientific

in nature or similar. In this connection, the national court ruled that the requirements of the relevant provisions of German law (4) were not satisfied. (5) Nor, in so far as German law was concerned, (6) could the plaintiff be considered to be `acting as an expert, lawyer or consultant'. The plaintiff, though a lawyer and an expert, could not be considered to be providing expert services, because judges also base their decisions on expert examinations. Nor, in its view, did his services fall within the non-occupational activities of a lawyer. Finally, they could not be described as `consultancy' services, since - being designed to bring the arbitration procedure to a successful conclusion - the activities of an arbitrator are `therefore broader in scope than those of a mere consultant'. Thus, as regards German law, the national court held that the place of supply of the plaintiff's services was Germany.

5 The national court recognized, however, that Article 9(2)(e) of the Sixth Directive is different and, in particular, that the expression `"other similar services" appears to give it a wider meaning than that of Paragraph 3(a)(4)3 of the 1980 UStG'. In its view, the fact that arbitration services are, by nature, part of the activities sometimes pursued by lawyers, might be sufficient to render them similar to lawyers' services under Article 9(2)(e). Accordingly, it referred the following question to the Court under Article 177 of the Treaty:

`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?'

B - Community legislation

6 Article 9 of the Sixth Directive concerns the `supply of services'. The relevant provisions for this case are as follows:

`1. 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.

2. However:

...

(e) 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, ...'

7 Article 21, which is the sole article of Title XII of the Sixth Directive and which concerns `persons liable to pay tax to the authorities', provides, at paragraph 1(b), that the `persons to whom services covered by Article 9(2)(e) are supplied and carried out by a taxable person resident abroad' shall be liable to pay VAT, although `Member States may require that the supplier of services shall be held jointly and severally liable for payment of the tax'.

II - Observations

8 Written and oral observations were submitted by the plaintiff, the defendant, the Federal Republic of Germany and the Commission. Counsel for the United Kingdom of Great Britain and Northern Ireland made submissions only at the oral hearing.

III - Analysis

A - The relationship between Article 9(1) and (2)

9 It is fortunate that the relationship between Article 9(1) and (2) of the Sixth Directive has been decisively laid down in the recent case-law of the Court. Germany, consistently with the stance it had adopted in Dudda v Finanzamt Bergisch Gladbach, (7) in its written observations in the present case, characterized Article 9(2)(e) as being a provision derogating from the general rule laid down in Article 9(1) and, thus, to be interpreted strictly. In particular, it took issue, as it was at liberty to do, with the view to the contrary effect that I had adopted in paragraphs 26 to 31 of my Opinion in Dudda (relating, in that case, to Article 9(2)(c) of the Sixth Directive). In Dudda, the Court, however, rejected Germany's submission in that case and, by implication, also in this case in the following terms: (8)

`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 ... . (9)

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).

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."

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.'

10 After the hearing in the present case, the interpretation given in Dudda of the relationship between Article 9(1) and (2) of the Sixth Directive to Article 9(2)(e) was applied by the Court in Linthorst, Pouwels and Scheres. (10) I am satisfied, therefore, that the issue of whether the services provided by the plaintiff are covered by Article 9(2)(e) can be decided without applying any restricted approach to its interpretation.

B - The effect of Article 9(2)(e) in Germany

11 The issue of the direct effect of Article 9(2)(e) of the Sixth Directive has been raised in certain of the observations submitted to the Court. I do not think that it is necessary, however, to express

any view on that issue, since it is clear from the order for reference that the national court, quite properly, intends to ensure that the UStG, which implements the Sixth Directive in Germany, is interpreted and applied in conformity with the Court's interpretation of Article 9(2)(e).

C - The recipients of arbitral services

12 Germany, the Commission and the United Kingdom have expressed doubts about the ruling of the national court that the plaintiff's services as arbitrator were provided to the ICC, but there is no question before the Court on this issue.

13 No doubt in a private arbitration these services are provided to the parties. As to whether the ICC system should lead to a different conclusion would depend on findings of fact by the national court, without which the Court would be indulging in speculation as to the true relationship between the arbitrator, on the one hand, and either the parties to the arbitration or the ICC, on the other.

14 The application of Article 9(2)(e) of the Sixth Directive depends, of course, on the recipient of the services being established either outside the Community or as a taxable person within the Community; matters which are to be determined by the national court, with the assistance of this Court, if requested. According to the information provided by the Commission at the hearing, the ICC is exempt from the payment of VAT under French law but circulates a notice stating that, though fees of arbitrators do not include VAT, any arbitrator, liable to pay that tax, may seek to recover it directly from the parties.

15 As the Court stated in its recent judgment in Phytheron International, `[w]ere the Court to base its ruling on the facts mentioned in course of proceedings before it, the very substance of the problem raised by the questions referred would be changed', and this `... would be incompatible with the Court's function under Article 177 of the Treaty and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations'. (11)

16 In my view, therefore, this Court should leave to the national court any questions about the identity of the true recipient of the services or its taxable status, and should confine itself to answering the question posed as to whether the third indent of Article 9(2)(e) includes the services of an arbitrator.

D - Services under Article 9(2)(e), third indent, of the Sixth Directive

17 The proper approach to the interpretation of the third indent of Article 9(2)(e) has now been explained by the Court in its judgment in Linthorst. It had been contended that veterinary services should be included as `similar services' within that indent. I expressed the opinion that the content of the services enumerated in the indent did not permit the application of the ejusdem generis principle of construction, (12) since `the application of that principle presupposes that it is possible to identify, from the matters enumerated in the legal text under scrutiny, a genus which precedes the general words [and that] the search is, thus, essentially for a sufficiently common element to permit the identification of a recognizable class'. I was of the opinion that no such common element could be identified.

18 The plaintiff argues that there is a common element linking the services listed in the third indent of Article 9(2)(e), namely that they are all specialized services of high quality whose provision is entrusted to the professionals concerned by reason of special confidence in their personal integrity and technical competence, which applies particularly to a professor of law selected as an arbitrator. In Linthorst, however, the Court ruled that `... the only common feature of the disparate activities mentioned ... is that they all come under the heading of liberal professions', but it went on to state that, `if the Community legislature had intended all activities carried out in an independent

manner to be covered by that provision, it would have defined them in general terms'. (13) This appears to rule out any attempt to deduce a guiding principle from the enumerated services.

19 It seems more appropriate, therefore, to consider whether the plaintiff's services come within one of the enumerated descriptions or are similar thereto. The plaintiff argues that his services are not merely similar to those of a lawyer but, in fact, identical to a part of such services. It is true that the present plaintiff's arbitral activities call most obviously for consideration of whether they constitute the services of a lawyer, but this has broader implications.

20 Before coming to a conclusion on that issue, I shall make some general observations on the services of arbitrators, prompted particularly by a remark in the Commission's written observations that it is so rare for lawyers to practise as arbitrators in private tribunals that the legislature had not mentioned them specifically. Admittedly, those observations were made prior to the judgment in either Dudda or Linthorst, and are based on the assumption that the third indent constituted an enumeration by way of example of independent services. However, I am surprised that it should be considered rare for lawyers to act as arbitrators. In the common-law countries, at least, it is by no means unusual for a lawyer to act as an arbitrator in private arbitrations. It is, indeed, common practice. The parties to private arbitrations are, of course, free to specify the qualifications, if any, of their arbitrator(s). The arbitration agreement will often assign to the president of a named professional institute the role of choosing an arbitrator in default of agreement of the parties. In this way, if not by individual agreement, the arbitrator chosen may be a lawyer, an engineer, an architect or an accountant. Indeed, such an arbitrator may be any other professional person, or simply a person of wide business or other relevant experience.

21 As counsel for the United Kingdom pointed out, in some Member States, such as the United Kingdom and Ireland, there are even two separate branches of the legal profession which traditionally concentrate on providing different types of legal services. It is difficult, therefore, to imagine that, by adopting the generic term `lawyers', the Community legislator intended only that those services provided by lawyers acting on behalf of a particular client would be covered. I think the Commission is right to suggest that regard must be had to the nature and content of the services. Thus, notwithstanding that, when nominated to act as arbitrators, lawyers no longer directly represent a specific client, it is clear that they, none the less, act broadly in the interests of the parties to the arbitration, who, moreover, have chosen arbitration as a means of obtaining a final and binding decision both quickly and at reasonable cost.

22 In my opinion, a lawyer, in independent practice, who undertakes the role of an arbitrator, is chosen for his legal expertise, just as engineers or accountants are, as the United Kingdom argued, chosen for professional expertise in their respective professions. (14) Such a lawyer is, in my view, providing the services of a lawyer for the purposes of the third indent of Article 9(2)(e). Whether the plaintiff is such a lawyer is a matter for the national court. In my view, the uniformity of Community law requires that a consistent interpretation be given to the notion of `lawyer'. In AM & S v Commission, (15) the Court ruled that the protection of professional legal privilege should only be extended to legal advice provided by a `lawyer entitled to practise his profession in one of the Member States', (16) as defined respectively for each Member State in Council Directive 77/249/EEC of 22 March 1977 (17) to facilitate the effective exercise by lawyers of freedom to provide services. I think the Sixth Directive should be interpreted similarly so far as lawyers' services are concerned. However, even if the plaintiff does not meet this test, by being a lawyer as defined in Article 2 of Directive 77/249/EEC (namely a `Rechtsanwalt' in Germany) he can equally be considered to act as a consultant, which is a word of broad import or, as I suggested in my Opinion in Linthorst, of `indeterminate ... scope'. (18) Persons providing independent services as arbitrators can therefore, in my view, be regarded as `consultants', or their practices as `consultancy bureaux': I agree with the United Kingdom that the inclusion of these descriptions indicates that the legislative intention was to give wide scope to the indent of Article 9.

23 I also agree with the view expressed by the United Kingdom that it would be illogical, particularly from the perspective of the parties to the arbitration (and thus potentially damaging to the choice of the Community as a venue for international arbitrations), (19) if the services provided by arbitrators were to be deemed to be supplied at a different place from those of the lawyers often engaged to act on behalf of the parties during the arbitration. The exclusion of arbitrators from the third indent would, as the United Kingdom also observed, have the effect (leaving aside any special role for the ICC) of imposing VAT on arbitrators' fees to be paid by parties established wholly outside the Community. This would not accord with the scheme and purpose of the Sixth Directive, particularly Article 9, as interpreted by the Court in Dudda. (20)

24 If they are not actually lawyers' or consultants' services, I think the plaintiff's activities fall within the scope of `other similar services', in the sense of being similar to those of a lawyer. It follows from Linthorst that the general approach to be adopted to the interpretation of the third indent of Article 9(2)(e) of the Sixth Directive is that, in order for services which are allegedly similar to one of the listed services actually to fall within the expression `and other similar services', they must be capable of being regarded as sufficiently similar to one or other of the `principal and habitual activities' (21) of the professions expressly listed in the indent. The present case concerns a professor of civil law. It is, thus, necessary to compare the services of such an arbitrator with those normally provided by lawyers. If such services are similar to `services of lawyers', it will not be necessary to examine whether they may, alternatively, be regarded as similar to the `services of consultants'.

25 In Dudda, in respect of the expression `similar activities' used in Article 9(2)(c) of the Sixth Directive in conjunction, inter alia, with `artistic' and `entertainment services', the Court stated that `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'. (22) I think that the same approach should be applied to the notion of `other similar services' under Article 9(2)(e).

26 I do not think that the fact that arbitral services differ from services normally provided by lawyers - that is to say, the resolution of a dispute as opposed to the provision of advice - precludes arbitral services from being regarded as similar to those of lawyers. The `principal and habitual activities' (23) of `lawyers' comprise the provision of manifold forms of advice to their clients and negotiations on their clients' behalf, as well as representation in legal proceedings.

27 However, having already taken the view that, subject to the national court's findings regarding the professional status of the plaintiff, the arbitral services in this case are lawyers' services, I have no doubt that, in the alternative, they are similar to lawyers' services.

28 Furthermore, unlike the services of veterinary surgeons, whose omission from the list could only reasonably be regarded to be deliberate, no such consideration applies in the case of arbitrators. (24) Indeed, given the myriad forms and types of arbitration proceedings, it is not surprising that no explicit reference to arbitral services was included in Article 9(2)(e). In my opinion, they are, by definition, ideally suited to being regarded, depending on the circumstances of each particular arbitration, as similar to the services of `consultants', `engineers' or `lawyers'.

29 Finally, certain doubts were raised, especially at the hearing, as to whether, if Article 9(2)(e) of the Sixth Directive were found to apply, the plaintiff would, consequently, be able to avoid paying VAT. I do not accept that the plaintiff may be seeking to avoid tax. If, as I think it should, the Court finds that Article 9(2)(e) is applicable, I think it is clear that Article 21(1)(b) obliges Member States to require the person to whom Article 9(2)(e) services have been supplied `by a taxable person resident abroad' to pay the VAT due. Thus, on the assumption that the plaintiff's services were supplied to the ICC as a taxable person in Paris, the appropriate French authorities should have sought payment of the VAT from the ICC. Moreover, Article 21(1)(b) also permits Member States to `require that the supplier of [such] services shall be held jointly and severally liable for payment of the tax'. France does not appear to have exercised this option, which is a decision for which the plaintiff bears no responsibility. If, on the other hand, the services are provided to parties established outside the Community, no VAT is payable.

IV - Conclusion

30 In the light of the foregoing, I recommend that the question referred by the Finanzgericht, Rheinland-Pfalz be answered as follows:

Article 9(2)(e) 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, should be interpreted as including arbitral services provided by practising lawyers. In so far as an arbitrator is not a practising lawyer, he may be considered to act as a consultant; in any event, the arbitrator's services, if he is chosen for his legal expertise, are similar to lawyers' services.

(1) - 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 (hereinafter `the Sixth Directive'); OJ 1977 L 145, p. 1.

(2) - The order for reference does not say whether the parties were established inside or outside the Community, or both.

(3) - This decision was apparently based on Paragraphs 1(1)(1) and 3(a)(1) of the Umsatzsteuergesetz 1980 (Law on Turnover Tax 1980, hereinafter `the UStG'); see BGBl, p. 1953.

(4) - See Paragraph 3(a)(3), read in conjunction with Paragraph 3(a)(2)3(a), of the UStG, which, according to the national court, provides that the place where `artistic, scientific, educational, sporting, entertainment or similar services, including the services of organizers', are deemed to be provided is that where the supplier carried out his activities.

(5) - The national court took the view that the services provided by the plaintiff could not, in German law at least, be regarded as applied science activities, which would be taxable, as scientific services, at the place of supply.

(6) - See paragraph 3(a)(4)3 of the UStG.

(7) - Case C-327/94 [1996] ECR I-4595, hereinafter `Dudda'.

(8) - See paragraphs 20 to 23 of the judgment.

(9) - The Court refers to Case 168/84 Finanzamt Hamburg-Mitte-Altstadt [1985] ECR 2251, paragraph 14 of the judgment.

(10) - Case C-167/95 Maatschap Linthorst, Pouwels and Scheres v Inspecteur der Belastingdienst/Ondernemingen Roermond [1997] ECR I-0000 (hereinafter `Linthorst'). See in general paragraphs 10 and 11 of the judgment and, regarding the interpretation of Article 9(2)(e), paragraphs 19 to 23; see also paragraphs 8 to 10 and 19 to 25, respectively, of my Opinion.

(11) - Case C-352/95 Phytheron International v Jean Bourdon [1997] ECR I-0000, paragraphs 12 and 14 of the judgment.

(12) - See paragraph 21 of the Opinion. For an exposition of the ejusdem generis principle, see, for example, Bennion, Statutory Interpretation (Butterworths, 2nd ed. 1992), pp. 860 et seq.

(13) - Loc. cit., paragraph 20 of the judgment.

(14) - I agree, therefore, with the views expressed by the Bundesfinanzhof in its judgment of 17 November 1960 (Case IV 135/58 U, Bundessteuerblatt III 1961, p. 60) to the effect that lawyers are chosen as arbitrators precisely because they are lawyers and may, thus, be relied upon to act with sufficient independence. Because of their professional experience, comprising essentially the resolution of legal problems through the objective application of legal principles, they are especially suited to many types of arbitration proceedings. Indeed, although the Bundesfinanzhof recognized that `lawyers generally defend the interests of one single party', it also aptly acknowledged that this `is not, however, an absolute rule ... [and that] the lawyer may equally provide advice to several parties who consult him collectively' and `he may also attempt to reconcile the opposing interests of several parties to a transaction, when they have a common interest in seeing their points of disagreement resolved'.

(15) - Case 155/79 [1982] ECR 1575.

(16) - Ibid., paragraph 25 of the judgment.

(17) - OJ 1977 L 78, p. 17.

(18) - Loc. cit., paragraph 24 of the Opinion.

(19) - See, in this respect, paragraph 5 of the Opinion of Advocate General Darmon in Case C-190/89 Rich [1991] ECR I-3855.

(20) - See especially paragraphs 21 to 23, quoted in paragraph 9 of the present Opinion.

(21) - This is the expression used by the Court in Linthorst, paragraph 22 of the judgment.

(22) - Loc. cit., paragraph 25 of the judgment (emphasis added).

(23) - Linthorst, paragraph 22 of the judgment.

(24) - The Court stated at paragraph 21 of its judgment in Linthorst that: `Moreover, if the legislature had intended that provision to cover the medical profession generally, as an activity carried out in an independent manner, it would have included it in the list, since, as the national court and the Advocate General in paragraph 22 of his Opinion pertinently observe, other provisions of the Sixth Directive, such as in particular the transitional exception provided pursuant to Article 28(3)(b) in conjunction with Annex F, specifically mention the services of veterinary surgeons'. The services of arbitrators, on the other hand, are not expressly mentioned in the Sixth Directive.