Conclusions
OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 13 January 2004(1)

Case C-68/03

Staatssecretaris van Financiën
v
D. Lipjes

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Sixth VAT Directive – Transitional arrangements for trade between Member States – Supply of services – Intermediary services in intra-Community acquisitions of goods – Place where the service is performed – Interpretation of Article 28b(E)(3))

1. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred to the Court two questions on the interpretation of Article 28b(E)(3) of the Sixth Directive on value added tax (2) ('the Sixth Directive').
2. The proceedings before the Netherlands court are aimed at determining the place of performance of the intermediary services provided by a professional operator in connection with the purchase of two yachts, located in France, on behalf of purchasers who were both resident in the Netherlands.
3. The Hoge Raad asks whether Article 28b(E)(3) applies where, in an intra-Community acquisition of goods, an agent negotiates on behalf of an individual who is not subject to value added tax ('VAT'). In the event that the reply to that question is in the affirmative, the Hoge Raad seeks guidance on the place where the taxable transaction must be deemed to have taken place.

I – The Community legal framework

4. The Sixth Directive makes the following subject to tax: the supply of goods and services (3) effected for consideration within the territory of a country by a person who is independently engaged in the activities of production, trade, or the supply of services, including the exercise of a profession (Articles 2(1) and 4(1) and (2)).
5. In the supply of goods, the taxable transaction occurs in the place where the goods are handed over, unless the goods need to be dispatched or transported in which case the point of reference is the time when transit to the purchaser begins (Article 8(1)). (4)
6. As regards services, the chargeable event is deemed to occur in the place where the person who supplies the services has established his business, or in the place where he has a fixed establishment from which the service is supplied. In the absence of those two criteria, the service is deemed to be supplied from the person's permanent address or usual residence (Article 9(1)).
7. However, where certain services (5) are supplied to persons who are established in a

country other than that of the supplier, be it inside or outside the Community, the rule changes and the place of the taxable transaction is determined by reference to the customer. In such cases, the reference point is either the place where the customer has established his business or the fixed establishment to which the service is supplied, or his permanent address or usual residence (Article 9(2)(e)). The same rule applies to agents in such transactions (final indent of Article 9(2)(e)). (6)

8. Directive 91/680 inserted into the Sixth Directive a new Title, numbered XVIa, which has the heading Transitional Arrangements for the Taxation of Trade between Member States and is aimed at facilitating the transition to a definitive system for taxing trade between Member States within the common system of value added tax, following the abolition of fiscal controls at internal frontiers with effect from 1 January 1993. (7)

9. Under those transitional arrangements, VAT is applied to intra-Community acquisitions of goods for consideration within the territory of a country by a taxable person acting as such, or by a non-taxable legal person, where the person disposing of the goods is also a taxable person and effects the transaction in that capacity (first subparagraph of Article 28a(1)(a)).

10. The taxable transaction is defined as the acquisition of the right to dispose, as owner, of movable property which is dispatched or transported to the person acquiring the goods by or on behalf of that person or the vendor to a Member State other than that from which the goods are dispatched or transported (first subparagraph of Article 28a(3)).

11. As with the supply of goods, the aforementioned transactions are taxed in the place of destination (Article 28b(A) and (B)).

12. Article 28b(C) changes the criterion in relation to services in the intra-Community movement of goods, which are deemed to be rendered at the place of departure. Under Article 28b(E), a similar rule applies where an intermediary is involved in the movement of goods. Where an intermediary is involved in the supply of services ancillary to the transport of goods, the activity of the intermediary is deemed to be carried out in the place where the ancillary activity is performed. In both cases, where the customer of the intermediary service is identified for VAT purposes in another Member State and the service is rendered under the VAT registration concerned, the taxable transaction takes place in the latter Member State (paragraphs (1) and (2)).

13. Article 28b(E)(3) provides:

‘By way of derogation from Article 9(1), the place of the supply of services rendered by intermediaries acting in the name and for the account of other persons, when such services form part of transactions other than those referred to in paragraph 1 or 2 or in Article 9(2)(e), shall be the place where those transactions are carried out.

However, where the customer is identified for purposes of value added tax in a Member State other than that within the territory of which those transactions are carried out, the place of supply of the services rendered by the intermediary shall be deemed to be within the territory of the Member State which issued the customer with the value added tax identification number under which the service was rendered to him by the intermediary.’ 8 –Article 6a of the Wet OB 1968, in the version set out in the Law of 24 December 1992 (Staatsblad 1992, p. 713), transposed Article 28b(E) of the Sixth Directive into Netherlands law.

II – The facts, the main proceedings and the questions referred for a preliminary ruling

14. Mr Lipjes, who is established in the Netherlands, works as a professional intermediary in the purchase and sale of pleasure craft, under the name Dutch Yachting Services.

15. During the period from 1 May 1996 to 31 December 1997, he acted as an intermediary in the acquisition of two yachts (9) located in France (Dunkirk and Ajaccio), on behalf of two private purchasers resident in the Netherlands. In both cases, the seller was an individual resident in France, and Mr Lipjes neither declared nor paid VAT in either Member State on the commission he charged his customers.

16. The Netherlands tax inspectorate (Belastingdienst/Ondernemingen Goes) issued a retroactive tax assessment to him in respect of the commission charged because, in the opinion of the inspectorate, Mr Lipjes had performed the services concerned in its territory.

17. The administrative complaint brought by Mr Lipjes was dismissed, whereupon he challenged the assessment in the Gerechtshof te ‘s-Gravenhage (the Hague Regional Court of Appeal), arguing that the service had been supplied in France. The Gerechtshof te ‘s-Gravenhage upheld that claim in the light of the place where the yachts were located on the day of sale.
18. The Staatssecretaris van Financiën (Secretary of State for Finance) brought an appeal in cassation, claiming that the first sentence of Article 28b(E)(3) of the Sixth Directive refers only to intermediary transactions carried out in pursuit of the activities of a taxable person, as defined in Article 4 of the directive. Accordingly, the determination of the place where Mr Lipjes carried out his work must be governed by the general rule set out in Article 9(1), meaning that he carried out his work in the Netherlands.
19. The Hoge Raad states that Article 9(1) does not distinguish by reference to the transaction (except in the case of the derogations it sets out) or to the person on whose behalf the intermediary acts, from which it follows that every service rendered by an intermediary (other than the ones specifically referred to in the article) must be subject to the rule that it is supplied in the place of the principal transaction, regardless of the capacity in which the recipient of the service acts. However, the Hoge Raad goes on to state that the foregoing interpretation is open to question in the light of the scheme of Title XVIa of the Sixth Directive and of Article 28b(E)(3).
20. The Hoge Raad took the view that Community case-law does not offer sufficient guidance to resolve the uncertainties, and it therefore decided to stay the proceedings and refer the following questions to the Court of Justice under Article 234 EC:
1. Must Article 28b(E)(3) of the Sixth Directive be construed as meaning that that provision refers only to services by intermediaries where the recipient of the service is a taxable person within the meaning of the directive or a non-taxable legal person within the meaning of Article 28a of the directive?
2. If not, must the first sentence of Article 28b(E)(3) of the Sixth Directive then be construed as meaning that where an intermediary acts in the purchase and sale of a tangible object between two individuals, for the purposes of determining the place where the intermediary acts, regard must be had to the place where the transaction is carried out, as if the transaction were a supply or service by a taxable person as referred to in Article 8 of the Sixth Directive?

III – The procedure before the Court of Justice

21. The Commission, the Netherlands Government and the Portuguese Government submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice.
22. Since none of the parties applied to present oral argument, the Court decided to dispense with a hearing, in accordance with Article 104(4) of the Rules of Procedure.

IV – Analysis of the questions

A – *The place of the taxable transaction in intermediary services*

23. Generally speaking, intermediary services are supplied in the place where the supplier has established his place of business, or, where appropriate, in the fixed establishment from where he supplies the services. (10) As I have already pointed out, in the absence of both those criteria, regard must be had to the supplier’s permanent address or usual residence. That rule embodies the principle of taxation in the country of origin and makes it possible to locate the activity giving rise to the tax obligation in a particular territory and to identify the applicable national legislation. (11)
24. The point of reference is transferred from the place of establishment of the supplier of the service to that of the customer where an intermediary acts in connection with the transactions referred to in Article 9(2)(e), and those transactions are carried out on behalf of persons established in another country.
25. An exception to the general rule also applies where a third party acts as an intermediary in the intra-Community transport of goods or in services ancillary thereto, in which case the taxable transaction is deemed to occur in the place of the principal activity, in other words, in the place where the transport of the goods begins or the place where the ancillary activity is carried out,

respectively. However, if the service is performed on behalf of a customer who uses in the transaction an identification number for VAT purposes which was issued by another Member State, the territory of that Member State becomes the point of reference for determining the place where the taxable transaction is performed.

26. Finally, the same criterion applies to establishing the place of the taxable transaction in relation to other types of intermediary services in the trade of goods between Member States, in other words, it is the place of the transaction in connection with which the intermediary acts, subject to the exception referred to above in cases where the principal is registered for VAT in another Member State.

27. To summarise, the services of an intermediary are subject to tax in the Member State where:

1. the intermediary is established (the general rule laid down in Article 9(1)); (12)
2. the customer is established (final indent of Article 9(2)(e));
3. the activity in connection with which the intermediary acts is carried out (first subparagraph of Article 28b(E)(1), (2) and (3)); or
4. the customer has a VAT identification number which is used in the transaction (second subparagraph of Article 28b(E)(1), (2) and (3)).

28. The situation in the main proceedings, where an intermediary acted on behalf of two individuals resident in the Netherlands in the acquisition of two yachts located in France, is only capable of being covered by the first or the third possibility.

B – *The personal scope of Article 28b of the Sixth Directive*

29. In order to choose correctly between the two alternatives, it is necessary to identify the scope of Article 28b. There are three possible interpretations in that regard, and those who have submitted observations in these proceedings have each advanced an argument which coincides with one of them. The first interpretation is that Article 28b covers all intermediary activities, other than the ones it cites, regardless of the capacity in which the customer acts and that of the seller in the principal transaction. That is the view of the Commission. In the opinion of the Netherlands Government, in order for Article 28b to apply, the activity must be carried out on behalf of a taxable person or a non-taxable legal person. Finally, the Portuguese Government puts forward an intermediate argument, which is that Article 28b covers services rendered to an individual, provided that the goods are transferred within the Community by a taxable person.

30. To my mind, the correct reply is the first one.

31. An interpretation of the articles inserted by Directive 91/680 by reference to their purpose supports that approach.

32. The disputed measure in these proceedings aims to meet the objective of abolishing fiscal controls at internal frontiers with effect from 1 January 1993, but, since the conditions necessary for establishing the principle of taxation in the country of origin (13) did not exist on 31 December 1992, it laid down a transitional period during which the rule of taxation in the country of destination was retained. (14) In order to facilitate the removal of customs frontiers, the measure abolished all formalities at those frontiers and, by creating a new definition of taxable transaction (intra-Community acquisition of goods), it placed all fiscal obligations on a similar footing to internal transactions.

33. In other words, the fact that the notion of taxable transaction remained in force during the transitional period amounted to a derogation, as concerns the trade in goods between Member States, from the principle of taxation at the place of departure. (15) In order to understand the scope of that provisional derogation, it must be borne in mind that VAT is a tax which is intended to be levied on acts of consumption – in the sense that they are an indirect indication of people's economic capacity – and that aim is achieved by imposing tax on transactions by traders and professionals, who, by the practice of passing on, transfer the tax burden to the end consumer. In that way, a 'neutral' tax is imposed on taxable persons: the tax is borne only by the final link in the chain, who is the person who receives the goods or benefits from the service. Accordingly, the Sixth Directive defines the taxable transaction without reference to the characteristics of the

person to whom the goods are delivered or the service rendered.

34. For tax to be due on an intra-Community acquisition of goods, the purchaser must be a taxable person or a non-taxable legal person (Article 28a(1)(a)). The justification for that rule is that, if the tax is paid in the country of destination, neutrality is guaranteed only where the person liable for payment is entitled to pass on the tax or deduct it, because he is a taxable person who uses the goods in activities which are actually subject to tax rather than an end consumer. For that reason, there is a presumption, under Article 28b(A) and (B) of the Sixth Directive, that the taxable transaction occurs in the Member State where dispatch or transport to the person acquiring the goods ends, or in the Member State in which the person acquiring the goods was issued a tax identification number under which he made the acquisition, and where he may deduct the tax that he has paid. (16)

35. Another essential element of the transitional regime instituted by Directive 91/680 lies in the principle of respect for the fiscal autonomy of the Member States. Each Member State has complete independence to define which transactions are taxable, but their respective tax-raising powers must be coordinated in such a way that, in any intra-Community transaction, where the authority of one Member State ends the authority of the other begins. Those requirements explain why, where the purchase of goods is taxed in the country in which those goods are handed over to the purchaser, the corresponding delivery made in the Member State of origin is exempt (Article 28c(A)(a)) in order to avoid double taxation. (17)

36. However, the foregoing considerations, which shed light on the wording of Article 28a(1)(a) of the Sixth Directive, do not apply to activities ancillary to the intra-Community acquisition of goods, nor to the resulting trade between one Member State and another, nor, in particular, to intermediary activities. Those cases do not consist of a series of transactions which are all, in principle, subject to VAT, which all take place in different Member States, and which must all be coordinated to ensure the neutrality of the tax and to safeguard the fiscal autonomy of each State; instead there is a single service, which is supplied on a professional basis, and which begins and ends in itself. Accordingly, the intervention by a third party in the acquisition and movement of goods within the Union is, for the purposes of VAT, deemed to occur in the place where the principal transaction is performed; in other words, in the place of departure, where the intermediary activity relates to transport (Article 28b(E)(1)); in the place where the activity is physically performed, where the intermediary acts in connection with an ancillary activity (Article 28b(E)(2)); and in the place where the operation is carried out, where the intermediary service relates to another type of operation (Article 28b(E)(3)).

37. For the same reason, it is immaterial whether the principal transaction is subject to tax or is a transfer between individuals. The activity of the intermediary exists in its own right and is taxed separately from the activity which it facilitates, to which it is only linked, in certain cases, in order to determine the place of the taxable transaction. Therefore, the noun ‘transactions’ is used by the provision to refer not only to transactions on which VAT is charged, but also to any transaction in which a taxable person acts on behalf of a person other than the ones referred to in Article 28b(E)(1) and (2) and Article 9(2)(e). In its written observations, the Commission asserts that it would be pointless to undertake a linguistic investigation, since the Sixth Directive does not differentiate and uses the aforementioned term to refer both to transactions which fall within its scope and to those which are not subject to tax.

38. Article 21 of the Sixth Directive, as amended by Directive 91/680, provides sound proof that the Community legislature does not require the customer in intermediary transactions to be a taxable person or a non-taxable legal person. When specifying who is liable to pay the tax, the provision distinguishes purchases within the Community consisting of a transfer from one country to another, which are referred to in Article 28a, from services rendered in connection with such transactions, which are referred to in Article 28b(C), (D) and (E). In the case of the former, Article 21 defines as liable to pay ‘any person effecting a taxable intra-Community acquisition of goods’ (Article 21(1)(d)), in other words, any person acquiring goods who is a taxable person or a legal person. However, in the case of the latter, Article 21 merely provides that the customer of the

services is liable to make the payment, including in connection with the services referred to in Article 9(2)(e), which, as everybody agrees, covers services supplied to individuals.

39. In the light of the observations made thus far, it is appropriate to conclude that Article 28b(E)(3) of the Sixth Directive refers to services supplied by intermediaries, regardless of the person to whom those services are rendered. To paraphrase the Portuguese Government (paragraph 16 of its written observations), it is possible to assert that, for the purposes of the application of the provision, the status of the individual on whose behalf the intermediary acts is immaterial; furthermore, for the reasons set out, the characteristics of the vendor in the principal transaction are likewise irrelevant.

40. Those findings are not altered by the arguments of the Netherlands Government. First of all, although in cases where the intermediary activity is performed on behalf of a person using a VAT identification number which was issued by a Member State other than the one in which the principle transaction takes place, the taxable transaction is presumed to occur in the territory of the first State, that does not mean that, under Article 28b(E)(3) of the Sixth Directive, only taxable persons liable to VAT are classed as customers; instead it means that, in those circumstances, the service is deemed to be rendered in the place specified. Where the customer is a private end consumer and is not, therefore, acting under a VAT registration number, the second situation does not arise and the taxable transaction occurs in the place where the activity in connection with which the intermediary acts is carried out.

41. The final argument advanced by the Netherlands Government in support of its position is based on the fact that, according to the second subparagraph of Article 28b(E)(3), the provision is aimed at precluding the customer of the services from being obliged to exercise his right to deduct the VAT he has paid in a country other than the one in which the transaction is actually taxed, by presuming that the intermediary activity took place in the Member State which issued the customer with the tax number under which he received the service. In the view of the Netherlands Government, that rule excludes individuals who are not entitled to deduct the tax paid. However, that approach disregards the fact that the second subparagraph of Article 28b(E)(3) of the Sixth Directive is specifically aimed at customers of services who are liable for VAT, a factor which does not exclude the application of the first part of the provision to a principal who is the end consumer of the service.

C – *The place of the taxable transaction in intermediary services under Article 23b(E)(3)*

42. Article 28b(E)(3) of the Sixth Directive applies to intermediary services carried out on behalf of an individual. Under the provision, the intermediary activity is deemed to be performed in the same place as the principal transaction. In view of the general scheme of the provision, paragraph (3) must refer only to intermediary services rendered in connection with intra-Community acquisitions and with the supply of goods defined in Article 28a(1), (3) and (5), whose location is established in accordance with Article 28b(A) and (B).

43. Under those provisions, the taxable transaction occurs in the place where the goods are at the time when dispatch or transport to the person acquiring them ends. (18)

44. The special rule laid down in Article 28b(E) of the Sixth Directive refers to the criteria mentioned in parts A and B, and not, as the wording of the question formulated by the Hoge Raad suggests, to the general rule governing the supply of goods which is set out in Article 8. (19)

45. Accordingly, the difficulties highlighted by those who have submitted observations in these proceedings are removed, while, at the same time, observance of the principle of rational and homogenous taxation to which they refer is guaranteed. In addition, the objective of adequately delimiting the scope of the VAT legislation of the different Member States and avoiding conflicts of jurisdiction, including double taxation, is met. According to Community law, (20) that objective is at the very heart of the provisions of the Sixth Directive which establish the place of the taxable transaction.

V – Conclusion

46. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the questions referred by the Hoge Raad by declaring that:

(1) Article 28b(E)(3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment also applies where the intermediary services to which it refers are supplied to an individual, irrespective of the capacity in which the person effecting the sale in the principal transaction acts.

(2) Accordingly, the place where the intermediary acts must be determined by reference to the criteria stated in Article 28b(A) and (B) of the Sixth Directive.

1 – Original language: Spanish.

2 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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). Article 28b was inserted by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

3 – The supply of services is a residual category comprising any transaction which does not constitute a supply of goods (Article 6 of the Sixth Directive).

4 – A special rule also applies to goods which require installation or assembly, in which case the place of supply is the place where those operations are carried out (Article 8(1)(a) *in fine*).

5 – Transfers and assignments of industrial and intellectual property rights; advertising services; services of professionals such as engineers, lawyers, accountants, as well as data processing and the supplying of information; banking, financial and insurance transactions; the supply of staff; and obligations to refrain from pursuing or exercising, in whole or in part, a business activity or one of the aforementioned rights.

6 – Article 9 of the Sixth Directive was transposed into Netherlands law by Article 6 of the Wet op de Omzetbelasting (Law on turnover tax) 1968 (‘Wet OB 1968’).

7 – That objective is set out in the third, eighth and ninth recitals in the preamble to Directive 91/680.

8 – Article 6a of the Wet OB 1968, in the version set out in the Law of 24 December 1992 (*Staatsblad* 1992, p. 713), transposed Article 28b(E) of the Sixth Directive into Netherlands law.

9 – According to the information supplied by the Hoge Raad, they were not ‘new means of transport’ which are defined in Article 28a(2) and subject to tax in accordance with Article 28a(1)(b).

10 – In Case 168/84 *Berkholz* [1985] ECR 2251, the Court stated that the place where the supplier has established his business is the primary point of reference, inasmuch as regard 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 (paragraph 17). The Court gave a similar ruling in Case C-190/95 *ARO Lease* [1997] ECR I-4383, paragraph 15, and Case C-390/96 *Lease Plan* [1998] ECR I-2553, paragraph 24.

11 – Pérez Herrero, L.M., *La Sexta Directiva Comunitaria del IVA*, first edition, Cedecs Editorial S.L., Barcelona, 1997, p. 132.

12 – It appears that the Commission was mistaken in its assertion that Article 9(1) does not apply to intermediary transactions. On the contrary, as I have just noted, that provision sets out the main criterion. The final indent of Article 9(2)(e) refers only to activity by an intermediary on behalf of persons established in another country where that activity relates to certain services. For its part, Article 28b(E) concerns the activities of intermediaries in the intra-Community acquisition and transport of goods. All other intermediary activities are subject to Article 9(1).

13 – That principle is vital to ensure that the abolition of the imposition of tax on imports and the remission of tax on exports is neutral, without prejudice to the principle that tax revenue should accrue to the benefit of the Member State in which final consumption takes place. That is clear from the seventh recital in the preamble to Directive 91/680 (‘… the taxation of trade between Member States [is required to] be based on the principle of the taxation in the Member State of origin of goods and services supplied without prejudice, as regards Community trade between

taxable persons, to the principle that tax revenue from the imposition of tax at the final consumption stage should accrue to the benefit of the Member State in which that final consumption takes place'), in conjunction with Article 4 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14), which states that its objective is '… abolishing the imposition of tax on importation and the remission of tax on exportation in trade between Member States, while ensuring the neutrality [of turnover taxes] as regards the origin of the goods or services'.

14 – The ninth, tenth and eleventh recitals in the preamble to Directive 91/680 explain the transitional phase and the desirability of taxing certain transactions in the Member State of destination while it remains in force.

15 – See Pérez Herrero, L.M., op. cit., p. 48.

16 – Article 17(2)(d) of the Sixth Directive, as amended by Directive 91/680, provides that a taxable person is entitled to deduct the tax which is due under Article 28a(1)(a), in so far as the goods and services are used for the purposes of his taxable transactions.

17 – If the transaction were also taxed in the Member State of departure, the purchaser would pay the same tax twice: the first time, as a result of the tax being passed on by the vendor, and the second time, as a result of the intra-Community acquisition in the Member State of destination.

18 – As concerns acquisitions, it is important to bear in mind the situation where the purchaser makes an acquisition under a tax identification number issued by a Member State other than the one to which the goods are delivered.

19 – In my opinion, in the main proceedings, the taxable transaction in the supply of the intermediary services concerned would have taken place in the Netherlands, provided that the yachts were handed over to the purchasers in that Member State, information which is not provided in the order for reference.

20 – See the judgments in Case 283/84 *Trans Tirreno Express* v *Ufficio Provinciale IVA* [1986] ECR 231, paragraphs 14 and 15; Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20; Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraph 10; Case C-429/97 *Commission* v *France* [2001] ECR I-637, paragraph 41; Case C-108/00 *SPI* [2001] ECR I-2361, paragraph 15; and Case C-438/01 *Design Concept* [2003] ECR I-0000, paragraph 22.