OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 14 September 2006 1(1)

Case C-111/05

Aktiebolaget NN

v

Skatteverket

(Reference for a preliminary ruling from the Regeringsrätten (Sweden))

(VAT – Supply and installation of an undersea fibre-optic cable between two Member States separated by international waters – Classification of the taxable transaction – Place of that transaction)

1. The purpose of these proceedings on a reference for a preliminary ruling is to establish how to calculate the value added tax (VAT) payable on the cost of supplying and installing an undersea fibre-optic cable between two Member States separated by international waters.

2. The questions referred relate, in essence, to the classification of such a transaction and its territorial allocation, in order to determine the entitlement of the Member States to charge taxes. The issue is, first, whether the transaction is to be classified as a supply of goods or a supply of services. It must subsequently be determined whether the transaction is to be split on the basis of the territorial positioning of the cable and whether or not VAT is payable on that part of the cable situated outside the territory of the Community.

I – **Legal framework**

A – *Community law*

3. Sixth Council Directive 77/388/EEC (2) gives VAT a very wide scope of application by providing, in Article 2(1), that ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’ is to be subject to value added tax.

4. Under Article 3(2) of the Sixth Directive, the ‘territory of the country’ shall be the area of application of the Treaty establishing the European Community as stipulated in respect of each Member State in Article 299 EC.

5. ‘Supply of goods’ and ‘supply of services’ are defined in Articles 5 and 6 of the Sixth Directive respectively.

6. Under Article 5(1) of the Sixth Directive, ‘supply of goods’ means the transfer of the right to dispose of tangible property as owner.

7. Article 6(1) of the Sixth Directive states that ‘supply of services’ means any transaction which does not constitute a supply of goods within the meaning of Article 5 of the directive.

8. Finally, Articles 8 and 9 of the Sixth Directive determine the place in which the transaction in question is taxable, depending on whether it is a supply of goods or a supply of services. The purpose of these articles, as is stated in the seventh recital in the preamble to the directive, is to avoid conflicts concerning jurisdiction as between Member States, in particular as regards supplies of goods for assembly and the supply of services.

9. Article 8(1) of the Sixth Directive is worded as follows:

‘The place of supply of goods shall be deemed to be:

(a) ... Where the goods are installed or assembled, with or without a trial run, by or on behalf of the supplier, the place of supply shall be deemed to be the place where the goods are installed or assembled. In cases where the installation or assembly is carried out in a country other than that of the supplier, the Member State into which the goods are imported shall take any necessary steps to avoid double taxation in that State;

...’

10. Article 9(1) of the Sixth Directive provides that 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.

11. However, Article 9(2)(a) of the Sixth Directive states that the place of the supply of services connected with immovable property shall be the place where the property is situated.

B – *National law*

12. It follows from Chapter 1, Paragraph 1, of the Swedish VAT law (Mervärdesskattelagen (3)) that tax liability presupposes that turnover is regarded as having been effected within the country.

13. In Chapter 1, Paragraph 6, of the ML, ‘goods’ are defined as material objects, including immovable property. According to the first section of Chapter 5, Paragraph 2, goods which are to be transported to a purchaser according to the contract between a seller and a purchaser are sold within the country if the goods are situated in the country when the seller, the purchaser or some other party initiates the transport to the purchaser (subparagraph 1) or if the goods are not situated in the country when the transport is initiated but are assembled or installed there by the seller or for his account (subparagraph 2).

14. Chapter 1, Paragraph 6, of the ML also provides that the term ‘services’ covers everything which is not regarded as goods and which can be supplied as part of a professional activity.

15. In accordance with the first subparagraph of Chapter 5, Paragraph 4, of the ML, services which relate to immovable property are supplied within the country if the property is situated there. According to point 4 of the first subparagraph of Chapter 5, Paragraph 6, services are supplied within the country if they are performed in Sweden and relate to works for goods which are movable property, including checking or analysis of such goods.

16. The first subparagraph of Chapter 5, Paragraph 8, of the ML provides inter alia that, for other services, the turnover is to be regarded as having been effected within the country if the party supplying the services has the seat of its economic activity or has a permanent trading establishment in Sweden from which the services are supplied. The national court points out, however, that that provision should not be applied to telecommunications services. The same subparagraph provides, finally, that the services, if they are not supplied from such a seat or place of establishment in Sweden or abroad, are supplied within the country if the party supplying the services is regarded as being usually or permanently resident in Sweden.

II – **Facts**

17. These proceedings arise out of an action between Aktiebolaget NN, (4) established in Sweden, and the Skatteverket (Local Tax Board) regarding the application of VAT to the costs relating to the supply and installation of an undersea fibre-optic cable between Sweden and another Member State from which it is separated by international waters.

18. Under the terms of the transaction envisaged by NN, the company will own the cable when the installation work is commenced. Ownership of the cable will be transferred to the client only after installation is complete and preliminary operational tests have been carried out.

19. The cable will be fixed and buried in the ground on the Swedish mainland then, metre by metre, lowered into the water. It will therefore be installed first in Swedish territorial sea (i.e. Sweden's inland and territorial waters), and then in international waters. It will then be laid in the inland and territorial waters of the other Member State and, finally, buried in the ground on the mainland of that State.

20. If the seabed conditions permit, the cable will also be buried there. Similarly, depending on the distance between the fixing points, it may in certain cases be necessary to lengthen the cable, which is a relatively complicated technical procedure.

21. It is up to the client, not NN, to settle questions of easement and to obtain the necessary permits.

22. In normal circumstances, the cost of the cable accounts for between 80 and 85% of the total cost of the transaction. However, that percentage may be reduced in unfavourable circumstances, for example in storms.

23. In order to ascertain how VAT on the cost of such a transaction should be determined, NN put the following two questions to the Skatterättsnämnden (Revenue Law Commission). It asked, first, whether the laying of an undersea cable between different countries constitutes a service relating to immovable property in accordance with Chapter 5, Paragraph 4, of the ML or work on movable property in accordance with Chapter 5, Paragraph 6, of the ML, or some other service and, in that case, what service.

24. It asked, secondly, whether Sweden constitutes the country of turnover for the laying of the undersea cable if it is laid between a point on land in Sweden and a point on land in another

country with the territorial waters of those countries and international waters between them.

25. In an interim decision of 13 June 2003, the Skatterättsnämnden found that the transaction envisaged was to be regarded as a service provided in Sweden under the first subparagraph of Chapter 5, Paragraph 8, of the ML.

26. It gave the following reasons for its decision. As regards, first, the classification of the transaction, it stated that, although the remuneration received by NN for the cable laying is for the greater part in respect of the cost of the cable itself, the transaction should as a whole, with reference inter alia to the complicated equipment and the skill required, be regarded as a supply of services.

27. Secondly, as regards the establishment of the place of the supply of the service, it bases its decision on the judgment in *Berkholz*, (5) which concerns taxation of the turnover generated by gaming machines on ferry-boats sailing between Germany and Denmark. It pointed out that, in that judgment, the Court of Justice held that Article 9 of the Sixth Directive does not restrict the Member States' freedom to tax services provided outside their territorial jurisdiction on board seagoing ships over which they have jurisdiction.

28. In that judgment, the Court also stated that the rule, laid down in Article 9(1) of the Sixth Directive, that the place where a service is supplied shall be deemed to be the place where the supplier has established his business, is a primary point of reference. That rule may be set aside only if it does not lead to a rational result for tax purposes or creates a conflict with another Member State.

29. The Skatterättsnämnden considered that, in the present case, the service provided by NN was not of such a nature as to render applicable connecting factors other than that of the place in which the company has established its business.

30. NN appealed against the interim decision of the Skatterättsnämnden. It claimed that the Regeringsrätten (Supreme Administrative Court) should amend the interim decision and hold that the planned transaction constitutes a service relating to immovable property and that VAT is therefore chargeable in Sweden only in respect of the cable situated on the Swedish mainland and in Swedish territorial waters.

III – **The questions referred for a preliminary ruling**

31. The Regeringsrätten explains that it is faced with the following two arguments. NN maintains that an undersea cable constitutes immovable property, whether it is buried in the ground or not. It follows that the services relating to that immovable property can be taxed in Sweden only in respect of that part of the cable situated in Sweden.

32. The Skatteverket submits that the consequence of NN's argument is that, for tax purposes, the operation should be split into three parts: the services relating to that part of the cable situated in Sweden, which should be taxed in Sweden, those relating to that part of the cable situated in the other Member State, which should be taxed in that Member State and, finally, those relating to that part of the cable submerged in international waters, which should not be taxed. The Skatteverket argues that that solution, which means that part of the transaction is untaxed, is contrary to the purpose of Article 9 of the Sixth Directive, which is designed to avoid not only conflicts of jurisdiction but also cases of non-taxation.

33. In the light of these considerations, the Regeringsrätten decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is a taxable transaction for the supply and installation of a cable, which is run between the territories of two Member States and also outside Community territory and to which the clearly greater part of the total cost is attributable, to be considered a supply of goods for the purposes of the provisions of the Sixth Directive regarding the place of taxable transactions?

(2) If such a transaction is instead to be considered the supply of a service, is that service to be regarded as having such a connection with immovable property that the place of the service is to be determined in accordance with Article 9(2)(a) [of the Sixth Directive]?

(3) If the answer to either the first or second question is in the affirmative, is Article 8(1)(a), or alternatively Article 9(2)(a) [of the Sixth Directive], to be interpreted as meaning that the transaction is to be split on the basis of the territorial positioning of the cable?

(4) If the answer to the third question is in the affirmative, are Article 8(1)(a), or alternatively Article 9(2)(a), and Articles 2(1) and 3(1) [of the Sixth Directive] to be understood as meaning that value added tax is not payable on that part of the supply of goods or services relating to the area outside the territory of the Community?’

IV – **Analysis**

34. First of all, it may be appropriate to point out briefly that the admissibility of the questions referred for a preliminary ruling by the Regeringsrätten, which is not disputed by the parties, cannot be disputed, even though the main action arises out of a simple request for an opinion regarding the taxation of a transaction which, at the time the request is made, has not yet been effected.

35. Indeed, the admissibility of questions referred for a preliminary ruling in that context was decided in the judgment in *Victoria Film*. (6) In that judgment, the Court of Justice held that questions referred for a preliminary ruling by the Skatterättsnämnden in connection with a preliminary decision are inadmissible, on the ground that it acts in an administrative capacity and is not called upon to decide a dispute. (7)

36. However, in the same judgment, the Court also held that, where the taxpayer or tax authority brings an action challenging a preliminary opinion given by the Skatterättsnämnden, the court or tribunal before which the matter is thus brought, could, for the purposes of Article 234 EC, be regarded as performing a judicial function with the object of reviewing the legality of an act determining a taxpayer’s assessment to tax. (8)

37. In accordance with that guidance, the Court has already examined, on several occasions, questions referred for a preliminary ruling by the Regeringsrätten in connection with an appeal against a preliminary opinion of the Skatterättsnämnden. (9)

A – *Question 1*

38. By its first question, the national court wishes to know how the transaction in question should be classified in the light of the Sixth Directive. Accordingly, it asks whether a taxable transaction for the supply and installation of a cable, which is run between the territories of two Member States and also outside Community territory and to which the clearly greater part of the total cost of that transaction is attributable, should be regarded as a supply of goods or as a supply of services within the meaning of the Sixth Directive.

39. In order to reply to this question, it must first be asked whether the supply and installation of the cable, in the circumstances described by the national court, are to be regarded as constituting a single transaction for the purposes of the Sixth Directive, not distinct transactions to be taxed separately.

40. I agree with the national court and the interveners that this is a single transaction.

41. According to the case-law, a transaction which comprises several elements, that is, either a package of services or a supply of goods and supplies of services, may be regarded as a single transaction for VAT purposes in various circumstances.

42. That is the case, for example, where one of those elements constitutes the principal service and the other element or elements is/are ancillary to it. Those services are regarded as ancillary because they do not constitute an aim in themselves, but simply a means of better enjoying the principal service. (10) They are therefore not essential.

43. A complex transaction may also be regarded as a single transaction where all the elements of which it is composed are essential. Accordingly, the Court has held that such a transaction must be regarded as constituting a single transaction where the various elements of which it is composed are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. (11) The transaction envisaged by NN seems to me to match this situation.

44. When we examine this transaction, as it is described by the national court, we observe that it consists of supplying and installing an undersea fibre-optic cable ownership of which is transferred to the client only after installation is complete and operational tests have been carried out. The agreement which NN and the client intend to conclude therefore concerns the transfer of a cable installed and in working order.

45. In my view, it would therefore be artificial to separate – in that agreement between those two economic traders – the supply of the cable itself and the supply of services relating to its installation. An analysis of a complex transaction must not depart from the established principle governing VAT, that account must be taken of commercial reality. Given that the right to dispose of the cable is transferred only when installation is complete and operational tests have been carried out, it would not be in keeping with the commercial reality of that transaction to consider that the client has first purchased the undersea fibre-optic cable and subsequently the services relating to its installation. The transaction must therefore be regarded as forming a single transaction for the purposes of the Sixth Directive.

46. It is then necessary to consider the classification of the transaction in question. Three opinions have been expressed in these proceedings.

47. The Skatteverket maintains that the transaction should be regarded as a supply of services. It points out that the transaction is made up of a series of services which cannot be considered ancillary. They consist in preliminary studies, installation work on land and at sea, the extension of

the cable to certain points, which is a complex technical operation, and, finally, testing. The Skatteverket points out that these services require specialised equipment and are absolutely essential to the objective pursued.

48. NN argues that the transaction at issue should be regarded as a supply of services relating to immovable property. According to that company, a cable thus laid constitutes immovable property within the meaning of the case-law, because it is incorporated into the ground. Its installation is therefore intended to fall within the scope of Article 5(5) of the Sixth Directive, according to which Member States may consider the handing-over of certain works of construction to be a supply of goods within the meaning of Article 5(1) of that directive. However, since the Kingdom of Sweden did not exercise that option, the transaction in question falls within the scope of Article 6(1) of the Sixth Directive.

49. The Commission of the European Communities takes the view that the transaction should be regarded as a supply of goods within the meaning of Article 5(1) of the Sixth Directive. I share that view for the following reasons.

50. It is important to point out, first of all, that the transaction in question does fall within the scope of Article 5(1) of the Sixth Directive. That provision defines ‘supply of goods’ as the transfer of the right to dispose of tangible property as owner. According to the case-law, the term must be construed broadly, as covering any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property. (12) It is undeniable that an undersea fibre-optic cable constitutes tangible property and that, after it has been installed by NN and after operational tests have been carried out, it will be transferred to the client, which will allow him to dispose of it as if he were its owner.

51. Furthermore, it is apparent from Article 8(1)(a) of the Sixth Directive that tangible property may be installed, whether or not operational tests are carried out, without the transaction necessarily losing its classification as a ‘supply of goods’. I think it is also possible to infer from that provision that tangible property may be installed in the ground in such a way as to be incorporated into it without for that reason necessarily having to be classified as ‘works of construction’ within the meaning of Article 5(5) of the Sixth Directive. Indeed, Article 8(1)(a) of the directive does not distinguish between the methods of installation.

52. Similarly, Article 5(5) of the Sixth Directive, which authorises the Member States to consider the handing-over of certain works of construction to be a ‘supply of goods’, did not reproduce the provision, contained in Article 5(2)(e) of Second Council Directive 67/228/EEC, (13) according to which the incorporation of tangible property into immovable property is the same as a work of construction. (14)

53. It is also apparent from an examination of the Sixth Directive that it does not provide many criteria for drawing the boundary between complex transactions which are to be considered as ‘supply of goods’ and those which come under the heading of ‘supply of services’. Nevertheless, we may be guided by the fact that ‘supply of services’ is ancillary to ‘supply of goods’.

54. Indeed, as we have seen, the term ‘supply of services’ covers any transaction which is not a supply of goods within the meaning of Article 5 of the Sixth Directive. It may therefore be inferred that, if a complex transaction is likely to be given one or other of those classifications, because there are as many factors in favour of one as of the other, it is ‘supply of goods’ which must be used.

55. In the absence of fuller information in the Sixth Directive, it is in the case-law that we find the method for determining how a complex transaction should be classified. According to settled case-

law, in order to determine whether such transactions constitute supplies of goods or supplies of services, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features. (15)

56. The Court of Justice proposed this method of analysis in the judgment in *Faaborg-Gelting Linien* regarding a transaction consisting in the supply of food for immediate consumption in a restaurant. It held that that transaction should be regarded as a supply of services because the provision of food is only one component and the services largely predominate. (16) It inferred that classification from a description of the transaction in question. Accordingly, it stated that that transaction is characterised by the cooking of the food, its physical service in a recipient, the placing at the customer's disposal of an infrastructure, including a dining room with appurtenances, furniture and crockery, and, finally, the serving at table by the staff who may inter alia advise the customer and explain the food and drink on the menu to him. (17)

57. This method of analysis was also applied in the judgment in *Levob Verzekeringen and OV Bank*, which I consider especially relevant to the present case, because it too concerns the classification of a transaction including both a single supply of goods and the supply of services inseparable from that supply. It relates to the supply of software which had to be specially adapted to the consumer's needs. The Court held that the transaction constitutes a supply of services not merely from a description of the overall transaction, as in the judgment in *Faaborg-Gelting Linien*, but in the light of the following criteria: the importance of the customisation of the basic software to make it useful to the purchaser, and the extent, duration and cost of that customisation. (18)

58. According to the statement of facts in that case, the services, that is to say, the customisation of the software, its installation and the staff training, were spread over more than a year; they began with an assessment of the customisation required and ended with an operational test, and they represented a much higher proportion of the overall cost of the transaction than the basic software. (19)

59. I believe that two conclusions relevant to the present case may be drawn from this case-law. The first is that, for the overall transaction to be classified as a supply of services, it is not enough that the services provided in connection with the transaction are necessary or simply useful to the purchaser of the goods. Those services have to be of a predominant nature. Thus, in the judgment in *Levob Verzekeringen and OV Bank*, the Court of Justice inferred the predominant nature of the work to customise the software not only from its importance in making it useful for the purchaser, but also from its extent, duration and cost.

60. The classification of the transaction in question therefore requires a comparative assessment of the respective importance, in that transaction, of the supply of goods and the supply of services. The transaction can be classified as a supply of services only if the services predominate. (20)

61. The second conclusion is that the criteria taken into account in order to make that assessment must be objective. That is a logical requirement because the purpose of the Sixth Directive is to base the common VAT system on a uniform definition of taxable transactions. (21) The condition that those criteria should be objective is also justified, because the classification of a complex transaction must be predictable to traders. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them. (22)

62. Classification of a complex transaction as a supply of goods or a supply of services can have significant consequences, especially as regards application of the rules governing the territoriality of taxation. Accordingly, in the present case, if the transaction is to be classified as a supply of

goods, it is covered by the second sentence of Article 8(1)(a) of the Sixth Directive, so that it is the location of the cable after installation which necessarily determines the power of the Member States to charge tax.

63. On the other hand, if the transaction is to be classified as a supply of services, Article 9 of the Sixth Directive provides for an alternative. The place of the taxable transaction shall be deemed to be either the place where the supplier has established his business, under Article 9(1) of the Sixth Directive, or the place where the cable is situated, under Article 9(2). In the first situation, the Kingdom of Sweden would be entitled to tax the whole of the transaction in question, as the Skatteverket claims. In the second situation, that Member State could charge tax on the transaction only in respect of that part of the cable situated on its mainland and in its territorial waters, as NN maintains.

64. In the present case, the national court requests the Court of Justice to specify whether the services to be carried out by NN are to be regarded as predominating, even though their cost represents only between 10 and 15% of the overall cost of the transaction.

65. The problem with that assessment arises out of the fact that those services relate to work which is essential for the use of the undersea fibre-optic cable, that they are very technical and that they require significant resources, such as the use of a specially fitted ship. Therefore, as I have already pointed out, that work is not ancillary within the meaning of the judgment in *Madgett and Baldwin*, that is to say, they do not constitute simply a means of better enjoying the supply of goods. The whole question is whether they are to be regarded as predominating, even though the price of the cable itself, if the transaction is carried out under normal circumstances, represents between 80 and 85% of the total cost of the transaction.

66. In the light of the fact that the greater part of the total cost of the transaction is attributable to the goods, I do not consider that the services can be regarded as predominating.

67. As I have pointed out, the classification of a complex transaction must be based on a comparison of the respective importance of the supply of goods and the supply of services, and that comparison must be made in accordance with objective criteria so as to culminate in a result which economic operators may foresee. In my view, the fact that the clearly greater part of the total cost of the transaction is attributable to the goods constitutes a criterion which meets those requirements fully.

68. Indeed, the proportion of the total cost of the transaction represented by the goods and that represented by the services make it possible to compare the respective importance of the supply of those goods and of those services on the basis of the same objective criterion. Furthermore, the price is the most relevant criterion for assessing the respective economic value of the goods and services in a complex transaction. I consider that where, as in the present case, the price of the goods is significantly higher than that of the services, it is that predominant proportion represented by the price of the goods in the overall cost of the transaction which must determine its classification.

69. A transaction concerning the transfer of a cable, installed and in working order, in which the price of the cable alone represents between 80 and 85% of the total cost of the transaction, should therefore be regarded as a supply of goods.

70. I therefore suggest that the Court reply to the first question referred for a preliminary ruling that a taxable transaction for the supply and installation of a cable, which is run between the territories of two Member States and also outside Community territory and to which the clearly greater part of the total cost of that transaction is attributable, is to be regarded as a supply of

goods within the meaning of the Sixth Directive.

B – *Question 2*

71. The second question relates to whether the transaction in question may be considered a supply of services having a connection with immovable property, within the meaning of Article 9(2)(a) of the Sixth Directive, or whether the place of the transaction is to be the place in which the provider of the services has established the seat of its economic activity.

72. Since this question presupposes that the transaction constitutes a supply of services and I have suggested that it be considered a supply of goods, I shall not examine it.

C – *Question 3*

73. By its third question, the national court is asking, in essence, whether, for the purposes of determining the power of the Member States to charge tax, Article 8(1)(a) of the Sixth Directive is to be interpreted as meaning that the transaction is to be split on the basis of the territorial positioning of the cable.

74. By this question, the national court wishes to know whether the power of the Kingdom of Sweden and of the other Member State to charge tax is to be restricted to that part of the cable situated in their respective territories. If not, that would mean that Article 8(1)(a) of the Sixth Directive is to be interpreted as conferring simultaneous jurisdiction on those two Member States, on the ground that the cable is situated in the territory of both of them at the same time.

75. In my view, this latter interpretation cannot be upheld. I agree with NN, the Skatteverket and the Commission that, for the purposes of determining the power of the Member States concerned to charge tax, the transaction is to be split on the basis of the territorial position of the cable.

76. I base this view, in accordance with the usual method of interpreting a provision of Community law, (23) on the wording of Article 8(1)(a) of the Sixth Directive, the system of which the provision forms part and the objective it pursues.

77. Article 8 of the Sixth Directive lays down a rule governing conflict of jurisdiction which determines the place in which a supply of goods is subject to tax and, consequently, the limits of the powers of the Member States concerned by the transaction to charge tax.

78. That article covers several kinds of supply of goods. It sets out specific instances of places where goods are deemed to have been supplied if they are dispatched or transported (Article 8(1)(a)), if they are not dispatched or transported (Article 8(1)(b)), or if they are supplied on board ships, aircraft or trains (Article 8(1)(c)).

79. The second sentence of Article 8(1)(a) of the Sixth Directive also lays down a rule conferring a special power where the goods are installed or assembled, with or without a trial run.

80. It should be noted briefly at this point that the scope of Article 8 of the Sixth Directive was considerably reduced by Council Directive 91/680/EEC. (24) The elimination of fiscal frontiers between Member States and the corresponding abolition of the imposition of tax on imports and of the remission of tax on exports, from 1 January 2003, made it necessary to adopt transitional rules for determining the place of the transaction in the case of the intra-Community acquisition of goods. Those transitional rules are contained in Article 28b of the Sixth Directive.

81. However, I do not consider those rules to be applicable in the present case. Those transitional arrangements apply to transactions in which goods have been moved from one

Member State to another. Article 28b(B)(1), second indent, of the Sixth Directive expressly states that the derogations it provides apply only where the supply is of goods other than goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier. It is therefore definitely the second sentence of Article 8(1)(a) of the Sixth Directive which should be applied in this case.

82. We have seen that that provision provides that the place of supply of goods which have been installed or assembled is the place where the goods are installed or assembled. In the case of goods incorporated into the ground, it is the place in which the goods are thus incorporated which determines which Member State has the power to tax the supply in question.

83. That provision bears a certain similarity to Article 9(2)(a) of the Sixth Directive, which provides that the place of the supply of services connected with immovable property is the place where the property is situated. In both cases, it is the physical location of the goods, that is to say, their territorial positioning which determines who has the power to tax the supply.

84. These criteria have the advantage of linking the power to charge tax with a material factor which is very easy to identify objectively. They are also logical, in the light of the rationale of VAT, according to which it is a tax on consumption. The place in which the goods are installed is in fact the place in which those goods are ‘consumed’ by the purchaser, just as the place in which the immovable property is situated may be considered to be the place in which the services relating to that immovable property are supplied to the purchaser of those services.

85. Finally, it is apparent from the seventh recital of the preamble to the Sixth Directive that the purpose of the second sentence of Article 8(1)(a) and of Article 9 is to avoid conflicts concerning jurisdiction as between Member States. As the Court of Justice has held, in respect of Article 9 of the Sixth Directive, the object is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation. (25) That analysis of the objectives of Article 9 of the Sixth Directive may be applied to Article 8 of the directive, as the Court of Justice acknowledged recently in the judgment in *Köhler*, (26) since the latter provision, like Article 9, forms part of Title VI of the Sixth Directive, which relates to the place of taxable transactions.

86. It is true that, in general, the purpose and effect of the application of the rules conferring jurisdiction laid down in Articles 8 and 9 of the Sixth Directive are to grant the power to charge tax to only one Member State. That applies to the provisions of the second sentence of Article 8(1)(a) and Article 9(2)(a) of the Sixth Directive. As a rule, goods are installed or assembled and immovable property is situated in one Member State. The risk of conflict regarding jurisdiction is therefore averted by granting tax jurisdiction to one State only.

87. However, the second sentence of Article 8(1)(a) of the Sixth Directive also applies and facilitates the resolution of conflicts of jurisdiction where, as in this case, the goods are installed in the territory of two Member States.

88. In those circumstances, the wording of the provision, its context and the objective it pursues provide grounds for interpreting it as meaning that each State is to be granted the right to tax the transaction in respect of that part of the goods installed in its territory.

89. That solution is wholly consistent with the wording of the provision in question, which links the power to charge tax to the place in which the goods are installed or assembled. It is also logical, in the light of the rationale of the Sixth Directive, since the cable, in this case, is installed metre by metre in the territory of each of the States concerned. The supply of the goods and, consequently, their 'consumption' by the purchaser have definitely taken place, therefore, in the territory of each of those States in turn.

90. Finally, the risk of conflict concerning jurisdiction as between the two Member States is resolved by the demarcation of their borders. In this situation, the place of the transaction under the second sentence of Article 8(1)(a) of the Sixth Directive is wholly comparable to the place of the transaction under Article 9(2)(b) of the Sixth Directive in respect of transport services, according to which 'the place where transport services are supplied shall be the place where transport takes place, having regard to the distances covered'. The risk of double taxation will be avoided because each State will be able to tax the transaction only in respect of that part of the cable situated in its territory and those territories do not overlap. (27)

91. Indeed, as I have pointed out, the territorial scope of the Sixth Directive is defined in Article 3 by reference to the provisions of Article 299 EC. This, let us remember, determines the territorial scope of the EC Treaty, giving the full name of each Member State, without reference to their territorial particulars. (28) It has been inferred that Article 299 EC referred back to the national provisions by which each Member State determines its territory. (29) It follows that the Sixth Directive refers back to the national laws for the demarcation of the territorial tax jurisdictions of each Member State.

92. If we consider the position with regard to the laying of an undersea cable linking two Member States, each of those States will therefore be entitled to tax the transaction in respect of that part of the cable situated on its land territory and in its internal waters. It may also tax that transaction in respect of that part of the cable in its territorial waters, since, in accordance with the international law of the sea, it exercises its sovereignty over the seabed. (30)

93. It may also be possible for a Member State to decide to tax the transaction in question in respect of that part of the cable situated in its exclusive economic zone or on its continental shelf, since it may also exercise sovereign rights there – albeit more restricted rights – particularly with regard to the exploitation of the seabed and its subsoil. (31) In that regard, the Court of Justice has held that Community law, in that case Council Directive 92/43/EEC, (32) was applicable in the exclusive economic zone and on the continental shelf of a Member State where that State exercised sovereign rights over those areas. (33) The Court concluded that the State had failed to fulfil its obligations by failing to adopt the measures necessary to implement the requirements of that directive.

94. In any event, at this stage of my analysis, what I think is important is that the allocation of the power to impose taxes between Member States according to that part of the cable situated in their respective inland and sea territories should not lead to conflicts of territorial jurisdiction and, consequently, to overlapping of tax sovereignty.

95. Admittedly, as the Skatteverket quite rightly points out, the allocation of the power to tax such a transaction may nevertheless create problems between the Member States. Those problems should not relate to taxation of the price of the cable itself. It is logical for the right of each State to charge tax on that price to be determined according to the length of the cable situated in its inland and sea territory in relation to the total length of the cable.

96. On the other hand, the allocation of the power to impose taxes may raise more queries

regarding the price of the services. The question may arise whether the services should be added together and the power to tax them be allocated in the same way as the price of the cable itself, that is to say, in proportion to the length of the cable situated in the territory of each State, or whether a distinction should be drawn between the services carried out in a specific place, like the extension of the cable between two fixing points, and the other services.

97. Faced with this alternative, I consider that the Member States would be justified in adopting the easier solution. It may be difficult and relatively arbitrary to decide with certainty which services relate to a specific place and which relate to the whole cable, such as the tests and operational tests.

98. Those difficulties may be compared with those which arise, for example, in the determination of the place of taxation for supplies of goods and services in connection with the construction of a bridge between two Member States. The extent of those difficulties has led the Council of the European Union to authorise the Member States concerned, in order to simplify the procedure for charging the tax – as they are permitted to do under Article 27(1) of the Sixth Directive –, to regard the works as being situated in the territory of only one Member State. (34) However, it is difficult to apply that solution where, as in this case, the two Member States are separated by a space which is not part of Community territory.

99. I therefore favour the solution of accepting that all the services relating to the installation and operational tests concern the cable as a whole and are to be regarded as having been carried out in each of the Member States in proportion to the length of the cable situated in its territory in relation to the total length of the cable. That solution is also consistent with the premiss that, in the present case, the supply and installation of the cable by NN are to be regarded as a single transaction for VAT purposes.

100. In the light of these considerations, I propose that the Court reply to the third question that Article 8(1)(a) of the Sixth Directive is to be interpreted as meaning that, for the purposes of determining the power of the Member States to charge tax, the transaction is to be split on the basis of the territorial positioning of the cable.

D – *Question 4*

101. By its fourth question, the national court asks whether Article 8(1)(a) of the Sixth Directive, read in conjunction with Articles 2(1) and 3(1), is to be interpreted as meaning that VAT is not payable on that part of the supply of goods relating to the area outside the territory of the Community.

102. It also wishes to know whether the Community legislation is to be understood as meaning that the transaction is not taxable in respect of that part of the cable situated in international waters.

103. I share the view of NN, the Skatteverket and the Commission, that VAT is not payable in respect of that part of the cable situated outside the territory of the Community.

104. As we have seen, Article 2(1) of the Sixth Directive provides that VAT is payable on taxable activities carried on within the territory of the country and that term, as set out in Article 3(2) of the directive, corresponds to the scope of the Treaty, as stipulated in respect of each Member State in Article 299 EC.

105. By those provisions, the Sixth Directive limits its scope to the territories defined by each of the 25 Member States as their national territory, over which they exercise tax sovereignty. Under the

international law of the sea, a State has no power of sovereignty over the high seas other than that which it exercises over ships flying its flag. (35)

106. As the Court held in the judgment in *Commission* v *France*, (36) the Sixth Directive contains no rule requiring the Member States to subject to VAT the parts of the journey constituting a transport service which take place beyond the territorial limits of the Member States in international space.

107. Admittedly, the Court has held, as regards the taxation of services on board ships, that the Sixth Directive does not prohibit Member States from extending the scope of their tax legislation beyond their territorial limits, so long as they do not encroach on the jurisdiction of other States. (37) It has also acknowledged, in the judgment in *Köhler*, that such considerations also apply in relation to taxation of supplies of goods. (38)

108. However, in my view, that extension of scope applies only where the supply of services or goods is carried out on board a means of transport, which thus constitutes the link with the tax jurisdiction of a Member State. Accordingly, in the judgment in *Köhler*, the Court was asked for an interpretation of Article 8(1)(c) of the Sixth Directive, under which the place of supply of goods, in the case of goods supplied on board ships, aircraft or trains during the part of a transport of passengers effected in the Community, is deemed to be at the point of the departure of the transport of passengers. This analysis is also corroborated by the judgment in *Berkholz*, in which the Court expressly linked that extension of jurisdiction to the exercise by the Member State of its jurisdiction on board the ship on which the services were supplied. (39)

109. Therefore, the extension of scope allowed by the Court in that specific context does not, in my view, undermine the rule that that scope is limited to the territory of the Member States, as defined by their own legislation.

110. I therefore suggest that the Court reply to the fourth question that Article 8(1)(a) of the Sixth Directive, read in conjunction with Articles 2 and 3, is to be interpreted as meaning that VAT is not payable on that part of the supply of goods relating to the area outside the territory of the Community.

V – **Conclusion**

111. In the light of the foregoing considerations, I suggest that the Court give the following reply to the questions referred for a preliminary ruling by the Regeringsrätten:

(1) A taxable transaction for the supply and installation of a cable, which is run between the territories of two Member States and also outside Community territory and to which the clearly greater part of the total cost of that transaction is attributable, is to be considered a supply of goods within the meaning 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, as amended by Council Directive 95/7/EC of 10 April 1995 introducing new simplification measures with regard to value added tax – scope of certain exemptions and practical arrangements for implementing them.

(2) Article 8(1)(a) of Sixth Directive 77/388, as amended by Directive 95/7, is to be interpreted as meaning that, for the purposes of determining the power of the Member States to charge tax, the transaction is to be split on the basis of the territorial positioning of the cable.

(3) Article 8(1)(a) of Sixth Directive 77/388, as amended by Directive 95/7, read in conjunction with Articles 2 and 3, is to be interpreted as meaning that VAT is not payable on that part of the

supply of goods relating to the area outside the territory of the Community.

1 – Original language: French.

2 – Directive 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), as amended by Council Directive 95/7/EC of 10 April 1995 introducing new simplification measures with regard to value added tax – scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18; 'the Sixth Directive').

3 – SFS 1994, No 200; 'the ML'.

4 – 'NN'.

5 – Case 168/84 [1985] ECR 2251.

6 – Case C-134/97 [1998] ECR I-7023.

7 – Paragraph 18.

8 – Ibid.

9 – Case C-240/99 *Skandia* [2001] ECR I-1951; Case C?320/02 *Stenholmen* [2004] ECR I-3509; and Case C?412/03 *Hotel Scandic Gåsabäck* [2005] ECR I-743.

10 – See, inter alia, Joined Cases C?308/96 and C?94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24, regarding the supply by a hotelier to his customers of excursions and of transport to his hotel; Case C?349/96 *CPP* [1999] ECR I-973, paragraph 30, regarding the supply of insurance services and other services to credit card holders; and Case C-34/99 *Primback* [2001] ECR I-3833, paragraph 45, regarding the supply by a furniture retailer to his customers of credit to finance their purchases in his shop.

11 – Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 22.

12 – See, inter alia, Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 7, and Case C?25/03 *HE* [2005] ECR I-3123, paragraph 64.

13 – Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1968 (I), p. 16; 'the Second Directive').

14 – Article 5(2) of the Second Directive provided:

'The following shall also be considered as supply within the meaning of paragraph 1:

...

(e) the delivery of works of construction, including those in which movable property is incorporated in immovable property'.

15 – Case C-231/94 [1996] ECR I-2395, paragraph 12, and *Levob Verzekeringen and OV Bank*, paragraph 27.

16 – *Faaborg-Gelting Linien*, paragraph 14.

17 – Ibid., paragraphs 13 and 14.

18 – Paragraph 28.

19 – The statement of facts shows that the price of the software was USD 713 000, whereas the cost of the customisation was within a range of USD 793 000 to USD 970 000, plus USD 15 000 for installing the software on the purchaser's computer system and training his staff.

20 – *Faaborg-Gelting Linien*, paragraph 14.

21 – *Shipping and Forwarding Enterprise Safe*, paragraphs 7 and 8. See also Case C?305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, paragraph 38, and Case C?223/03 *University of Huddersfield* [2006] ECR I-1751, paragraphs 40 and 48.

22 – Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 72 and the case-law cited therein, and *University of Huddersfield*, paragraph 49.

23 – See, for a recent application relating to VAT, concerning Article 9 of the Sixth Directive, Case C-114/05 *Gillan Beach* [2006] ECR I-2427, paragraph 21.

24 – Directive 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).

25 – Case C-452/03 *RAL (Channel Islands) and Others* [2005] ECR I?3947, paragraph 23.

26 – Case C-58/04 [2005] ECR I-8219, paragraph 22.

27 – In Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 16, the Court of Justice held that the specific attachment rule for transport services, which constitutes a derogation from the general rules for determining the place where a service is supplied laid down in Article 9(1) of the Sixth Directive, is thus intended to ensure that each Member State taxes transport services as regards the parts of the journey carried out in its territory.

28 – Article 299(1) EC provides:

'This Treaty shall apply to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.'

29 – Case 148/77 *Hansen* [1978] ECR 1787, paragraph 9.

30 – See, in that regard, Article 2 of the United Nations Convention on the Law of the Sea ('the Montego Bay Convention') concluded in Montego Bay on 10 December 1982, approved on behalf of the Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1), and ratified by all the Member States of the European Union.

31 – See Articles 56 and 77 of the Montego Bay Convention with regard to the exclusive economic zone and the continental shelf respectively.

32 – Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

33 – Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 117.

34 – See, inter alia, Council Decision 2005/713/EC of 11 October 2005 authorising the Federal Republic of Germany and the Kingdom of the Netherlands to apply a measure derogating from Article 3 of the Sixth Directive (OJ 2005 L 271, p. 39). See also Council Decision 95/114/EC of 30 March 1995 authorising the Federal Republic of Germany and the Grand Duchy of Luxembourg to apply a measure derogating from Article 3 of the Sixth Directive (OJ 1995 L 80, p. 46).

35 – See Articles 89 and 92 of the Montego Bay Convention.

36 – Paragraph 17.

37 – Case 283/84 *Trans Tirreno Express* [1986] ECR 231, paragraph 20.

38 – Paragraph 25.

39 – Paragraph 16.