OPINION OF ADVOCATE GENERAL

BOT

delivered on 13 January 2011 (1)

Case C?530/09

Inter-Mark Group sp. z o.o., sp. komandytowa w Poznaniu

v

Minister Finansów

(Reference for a preliminary ruling from the Wojewódzki S?d Administracyjny w Poznaniu (Poland))

(Directive 2006/112/EC – VAT – Supply of services – Determination of the place of supply for tax purposes – Temporary provision of fair stands)

1. The present reference for a preliminary ruling concerns Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, (2) and, more particularly, the determination of the place at which a supply of services involving the temporary provision of fair stands is made.

2. The national court is essentially asking the Court of Justice to rule whether a supply of services consisting in the temporary provision of stands for fairs or exhibitions constitutes a supply of advertising services within the meaning of Article 56(1)(b) of Directive 2006/112, and thus taxable at the place where the customer is established, or whether such a supply comes within the scope of Article 52(a) of that directive, which applies to cultural, artistic, sporting, scientific, educational, entertainment and similar activities, including, where appropriate, ancillary services, and thus taxable at the place where the services are physically carried out.

3. In this Opinion, I shall set out the reasons for my view that Article 52(a) of Directive 2006/112 must be interpreted as meaning that the supply of services consisting in the temporary provision of fair stands to exhibitors is a supply which is ancillary to fair and exhibition activities and thus comes within the scope of that provision.

I – **Legal context**

A – *European Union law*

4. Sixth Directive 77/388/EEC, (3) significantly amended on a number of occasions, has been recast as Directive 2006/112.

5. Article 1(2), first subparagraph, of Directive 2006/112 states that the principle of the common system of value added tax (‘VAT’) entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services.

6. The fundamental principle governing the common system of VAT is thus taxation at the place of actual consumption, (4) which ensures that VAT revenue goes to the Member State in which final consumption of goods or services takes place.

7. Thus, determination of the place of consumption is of vital importance, since the payment of the VAT to the Member State of consumption depends upon it.

8. In order for that principle to be made applicable, and in order to avoid conflicts concerning jurisdiction as between the Member States, (5) and also to prevent the double imposition or non-imposition of VAT, the European Union legislature has instituted, in so far as concerns the supply of services, a general rule and special rules which apply depending on the nature of the service supplied.

9. Thus, Article 43 of Directive 2006/112 provides that the place of supply of services is 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.

10. As regards cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organisers of such activities and, where appropriate, ancillary services, Article 52(a) of Directive 2006/112 provides that the place of supply of such services is the place where the services are physically carried out.

11. Finally, Article 56(1)(b) of Directive 2006/112 provides that the place of supply of advertising services to customers established outside the European Community, or to taxable persons established in the Community but not in the same Member State as the supplier, is the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides.

B – *National law*

12. Article 27(2)(3)(a) of the Law of 11 March 2004 on value added tax (Ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug), (6) provides that, in the case of the supply of services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs and exhibitions, and ancillary services, the place where the services are supplied is the place where the services are physically carried out.

13. Article 27(3) of that Law states that, where services referred to in Article 27(4) are supplied to natural persons, legal persons or organisational entities without legal personality, which have their place of establishment or residence within the territory of a non-member country, or to taxable persons having their place of establishment or residence within the Community but not in the same State as the supplier, the place of supply of those services is the place where the customer receiving the services has established his business or has a fixed establishment for which the services are supplied or, in the absence of such a seat or place of fixed establishment, the place where he has his permanent address or usually resides.

14. Pursuant to Article 27(4)(2) of that Law, Article 27(3) applies to, inter alia, advertising

services.

II – The facts and dispute in the main proceedings

15. Inter-Mark Group sp. z o.o., sp. komandytowa w. Poznaniu ('Inter-Mark') is registered in Poland and, as such, is subject to VAT. The business which it wishes to carry on consists in the temporary provision of stands to mainly non-Polish exhibitors presenting their goods and services at fairs and exhibitions. These fairs and exhibitions may be located on Polish territory or on the territory of other Member States or non-member countries.

16. The national court states in its reference for a preliminary ruling that the design of a stand will generally be prepared and the stand visually presented before it is supplied to the customer. It also states that Inter-Mark may, as part of its business, also deal with transport of the components of the stand and assemble it at the location where the fair or exhibition is being held.

17. In order to determine the amount of VAT to which its business would be subject, Inter-Mark requested, by letter of 11 February 2009, an interpretation of the provisions of the Law on VAT from the Dyrektor Izby Skarbowej w Poznaniu (Director of the Pozna? Tax Chamber).

18. By letter of 4 May 2009, the Director replied that, in the case of a business such as that of Inter-Mark, the place of supply of the services was, in accordance with Article 27(2)(3)(a) of the Law, the place where the services were physically carried out. He expressed the view that, contrary to Inter-Mark's submissions, its activities did not constitute a form of persuasive communication and could not, therefore, be regarded as involving supplies of advertising services.

19. Inter-Mark requested the Director of the Pozna? Tax Chamber to reconsider his decision. By letter of 12 June 2009, the latter confirmed his earlier position.

20. Taking the view that the services which it proposes to offer are to be regarded as advertising services, Inter-Mark brought an action against the decision of 4 May 2009 before the national court.

III – The questions referred for a preliminary ruling

21. In doubt as to the correct interpretation of certain provisions of European Union law, the Wojewódzki S?d Administracyjny w Poznaniu (Regional Administrative Court, Pozna?) (Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(a) Are the provisions of Article 52(a) of … Directive 2006/112 ... to be interpreted as meaning that services consisting in the temporary provision of exhibition and fair stands to clients presenting their goods and services at fairs and exhibitions must be classified as services ancillary to the fair and exhibition services referred to in those provisions, that is to say, services similar to cultural, artistic, sporting, scientific, educational and entertainment activities, which are taxed at the place where they are physically carried out,

(b) or should it be accepted that they are advertising services taxed at the place where the customer has established his business on a permanent basis or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides, in accordance with Article 56(1)(b) of Directive 2006/112,

on the basis that those services concern the temporary provision of stands to clients presenting their goods and services at fairs and exhibitions which is normally preceded by the drawing-up of a design and visual presentation of the stand and, possibly, transportation of parts of the stand and

its assembly at the place where the fair or exhibition is organised, and the service supplier's clients exhibiting their goods or services pay separately to the organiser of the relevant event fees for the very possibility of participating in the fair or exhibition which cover utility, fair-infrastructure and media-service costs and so forth,

each exhibitor being separately responsible for fitting out and constructing his own stand and in that respect using the services at issue which require interpretation,

and organisers charging visitors individually fees for entrance to their fair or exhibition which accrue to the organiser of the event and not to the supplier of the service?'

IV – **My analysis**

22. Before undertaking my analysis, it seems appropriate to make the following observations.

23. The dispute in the main proceedings arose between Inter-Mark and the Dyrektor Izby Skarbowej w Poznaniu with regard to the latter's opinion as to the future taxation of Inter-Mark's business. At the time when the national court referred its questions to the Court of Justice, no taxable transaction had therefore yet taken place. It might, for that reason, be raised as a point of criticism that the Court is proposing to give a ruling on a question which is purely hypothetical in nature.

24. However, I do not think that that circumstance casts doubt on the admissibility of those questions, this being a view which, moreover, is not disputed by the parties.

25. There is a genuine dispute before the national court. Inter-Mark has brought proceedings against the prior opinion delivered by the Dyrektor Izby Skarbowej w Poznaniu, thereby seeking judicial review of the legality of that opinion. The Court therefore has sufficient information at its disposal regarding the circumstances with which the main proceedings are concerned to be in a position to interpret the rules of European Union law. (7)

26. In the present case, the national court is thus asking, in essence, whether the temporary provision to exhibitors of exhibition and fair stands constitutes an advertising service taxable at the place in which the customer is established, or whether that kind of service is a cultural, artistic, sporting, scientific, educational, entertainment or similar kind of service, taxable at the place where the fair or exhibition is held.

27. For reasons which I shall now set out, I am of the opinion that the provision to exhibitors of fair or exhibition stands constitutes a supply of services ancillary to fair- and exhibition-related activities and is taxable at the place where the service is physically carried out.

28. Admittedly, in its judgment in *Design Concept*, (8) the Court has already had occasion to rule on the problem at present before it. In that judgment, it proceeded from the premiss that a supply of services consisting in the construction and cleaning of stands, and the provision of staff to transport equipment, constituted a supply of advertising services.

29. However, that judgment does not seem to me to be conclusive as regards the question now asked of the Court, and that for the following two reasons.

30. First of all, the Court accepted the national court's classification of the services, which, the latter had concluded, were prima facie advertising services. The Court explained that it is settled case-law that, in the context of the cooperation between the Court of Justice and national courts, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular

circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (9) As the national court in that case had expressed the view that the services in question were, prima facie, advertising services, the Court of Justice refrained from altering that classification of the supply of services in any way. (10)

31. Secondly, however, the Court of Justice also stated that the notion of advertising services is an independent concept of European Union law and that it is for the national court, where necessary, to determine the classification of the services concerned in the light of the case-law of the Court. (11)

32. It cannot therefore be inferred from the judgment in *Design Concept* that the temporary supply of stands on the occasion of a fair or exhibition amounts to a supply of advertising services within the meaning of Article 56(1)(b) of Directive 2006/112.

33. Furthermore, in its judgment in *Gillan Beach*, (12) the Court arrived at a different classification for this type of supply of services.

34. The factual background to that case involved a company, Gillan Beach Ltd, which had organised two boat shows in France and had supplied exhibitors with all-in services which included the setting-up of stands and means of communication and making them available for use. The question in issue in the main proceedings was whether such an activity came within the scope of the first indent of Article 9(2)(c) of the Sixth Directive (Article 52(a) of Directive 2006/112) as being an activity similar to those referred to in that provision.

35. The Court first of all pointed out that the European Union legislature had taken the view that, in so far as the supplier provides his services in the State in which such services are physically carried out and the organiser of the event charges the final consumer VAT in the same State, the VAT charged on the basis of all those services, the cost of which is included in the price of the complete service paid for by that consumer, must be paid to that State and not to the State in which the supplier of the service has established his business. (13)

36. The Court next explained that a show or a fair seeks to provide to a number of different recipients, as a rule in a single place and on a single occasion, a variety of complex services, with the purpose, in particular, of presenting information, goods or events in such a way as to promote them to visitors. (14)

37. The Court then went on to hold that the inclusive service provided to exhibitors by the organiser of a fair or a show, in that case setting up stands and means of communication and making them available for use, providing staff to welcome visitors, and renting and arranging surveillance of mooring areas for the boats on show, had to be regarded as being one of the services referred to in the first indent of Article 9(2)(c) of the Sixth Directive. (15)

38. The difference between the case which led to that judgment and the present case lies in the fact that Inter-Mark is not the organiser of the fairs or exhibitions and also does not provide its services to the organiser of those fairs or exhibitions. The services which Inter-Mark offers consist in the temporary provision, solely to exhibitors, of stands at fairs or exhibitions.

39. For that reason, the European Commission takes the view that Article 52(a) of Directive 2006/112 is not applicable to the present case. It maintains that, since the costs of the service of supplying exhibitors with stands are not included in the price of the complete exhibition service provided by the organiser of the show, the services supplied by Inter-Mark cannot be taxed at the place where they are physically carried out. (16) According to the Commission, it follows from

recital 17 in the preamble to Directive 2006/112, which states that the place where a supply of services is carried out should be fixed in the Member State of the customer, 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, that that is the criterion which must be applied when determining the place of supply, for tax purposes, of the services referred to in Articles 44 to 59 of that directive. (17) That criterion, the Commission submits, is not satisfied in the present case.

40. The characteristics of the supplier of services, it argues, thus play a decisive role in the application of Article 52(a) of Directive 2006/112 to the supplies of services.

41. I do not share the Commission's view for the following reasons.

42. First of all, in its judgment in *Kronospan Mielec*, (18) the Court stated that it is apparent from the use of the words 'in particular' in the seventh recital in the preamble to the Sixth Directive (recital 17 in the preamble to Directive 2006/112), that the scope of Article 9(2) of the Sixth Directive (Article 52 of Directive 2006/112) is not restricted to services between taxable persons where the cost of the services is included in the price of the goods. (19) It went on to add that the Sixth Directive contained nothing which allows the conclusion to be drawn that the fact that the recipient includes the costs of the services not directly, but indirectly, in the price of the goods and services which it offers is relevant for the purposes of establishing whether a service is covered by Article 9(1) or 9(2) of the Sixth Directive. (20)

43. Therefore, whether or not the cost of the supply of the service is included in the price of the goods is irrelevant, in my view, to the question whether Article 52(a) of Directive 2006/112 applies.

44. Next, I believe that the wording of that provision shows that it refers equally to the organisers of such events as to suppliers of services who are not involved in the organisation of those events.

45. Article 52(a) covers supplies of services relating to the activities that are listed therein, '*including the activities of the organisers of such activities*'. (21) It is my view that the European Union legislature used the word 'including' precisely in order to show that the supplies of services covered extend to services supplied by organisers just as well as to services supplied by other service providers, provided that the activity concerned is among those listed in Article 52(a) of Directive 2006/112.

46. It seems to me, in this regard, that if the European Union legislature went to the trouble of making supplies of services relating to artistic, cultural and other similar activities subject to a different rule from the general rule in so far as concerns the determination of the place of taxation, it was not so much for the nature of the service provider as for the nature of the services being offered. It is in fact clear from the wording of Article 52(a) of Directive 2006/112 that it is the purpose for which the services are provided that determines whether or not the provision will apply to any given services. Thus, in order for that provision to apply, the activity being carried on by the supplier of the services must be among those listed.

47. That view is, I believe, corroborated by the interpretation which the Court gave to Article 9(2)(c) of the Sixth Directive in its judgment in *Gillan Beach*, cited above. In order to determine whether the services in question in that case fell within the scope of that provision, the Court referred to the purpose of the activity, and not to the nature of the supplier of the service. It thus stated that an activity must be regarded as similar, within the meaning of that article, where it includes features that are also present in the other categories of activities listed in that provision and which provide justification for the application of that provision to those activities. (22)

48. The Court went on to state that services connected with such activities were complex in nature, included various services, and were generally provided for a number of different recipients, that is to say, all the people taking part, in a variety of capacities, in cultural, artistic, sporting, scientific, educational or entertainment activities. (23) It added that such services also have the common feature that they are usually provided for specific events, and the place where those complex services are physically carried out is easy to identify, as a rule, since such events take place at specific locations. (24)

49. It is quite clear that the question whether Article 52(a) of Directive 2006/112 applies to a given supply of services depends, not on the nature of the supplier, but on the specific purpose for which the services are supplied.

50. We find the same approach taken, moreover, in the judgment in *Dudda*. (25) In that judgment, the Court stated, with regard to the supply of services ancillary to cultural, artistic, sporting, scientific, educational, entertainment and similar activities, that these were services ancillary to the principal activity from an objective point of view, irrespective of the person providing them. (26) It added that that interpretation was supported by the wording of the first indent of Article 9(2)(c) of the Sixth Directive, which refers to the supply of services ancillary to, inter alia, artistic or entertainment activities, without any mention of the persons carrying on those activities. (27)

51. That analysis is justified by the fact that the underlying logic of Article 52 of Directive 2006/112 requires that the services listed therein be taxed as far as possible in the place of consumption. (28) For all these categories of services, the place where the services are physically carried out is, as a rule, easy to identify. (29) The decisive factor, therefore, which enables taxation to be effected closest to the place of actual consumption is not the identity of the supplier of the services, but the actual purpose for which the services are supplied, which makes it easy to identify the place where the services are carried out.

52. With regard to the actual purpose of the supply of the services in issue in the main proceedings, the national court is unsure whether the services in question may not be regarded as advertising services within the meaning of Article 56(1)(b) of Directive 2006/112, and thus taxable at the place where the customer has established his business.

53. The doubts on the part of the national court arise from the fact that the services which Inter-Mark provides are tailored to the individual requirements of its customers, in particular as regards the external appearance and functionality of the stands. The arrangement of the stands thus has the purpose of awakening the interest of potential purchasers and becomes part of an operation to promote the products and services offered by the exhibitor. In that regard, the services are similar to advertising services.

54. The Commission submits in this connection that the appearance and setting up of stands may increase significantly the promotional value of the products displayed by exhibitors. (30) It therefore takes the view that the supply of personalised stands, that is to say, stands designed specially for a particular exhibitor and inextricably linked to the corporate image of the exhibitor, might be deemed to constitute a supply of advertising services. (31)

55. The concept of advertising services was defined in the judgment in Case C?68/92 *Commission* v *France*. (32) In that judgment, the Court stated that the concept of advertising necessarily entailed the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales. (33) It went on to state that that message could be spread by the use of means other than spoken or printed

words or pictures, the press, or radio and television. (34)

56. The Court added that the nature of the supplier was not an essential condition in order for a service to be characterised as an advertising service and that it was sufficient that a promotional activity, such as the sale of goods at reduced prices, the handing-out to consumers of goods sold to the person distributing them by an advertising agency, the supply of services at reduced prices or free of charge, or the organisation of a cocktail party or banquet, involved the dissemination of a message intended to inform the public of the existence and the qualities of the product or service which was the subject-matter of the activity, with a view to increasing the sales of that product or service, in order for it to be characterised as an advertising service. (35)

57. The same applies to any activity which forms an inseparable part of an advertising campaign and which thereby contributes to conveying the advertising message. (36)

58. While it is true that the setting-up of a stand by a service supplier contributes to promoting an exhibitor's products and must for that reason be done attractively, I do not think, for all that, that it should be regarded as an advertising service within the meaning of Article 56(1)(b) of Directive 2006/112.

59. Admittedly, the mere supply of stands for the purposes of a fair is not the same activity as the fair itself. Nevertheless, stands are the essential physical requirement for the accomplishment of that activity. The sole purpose, therefore, of supplying stands is, I believe, to allow people actually to participate in the fair by enabling exhibitors to present their products.

60. As such, the provision of stands by a supplier of services other than the organiser of the fair or exhibition is a service ancillary to the activity of organising that fair or exhibition, because it is a prerequisite for the performance of that activity. (37)

61. The fact that Inter-Mark offers to personalise the stands which it sets up cannot, in my view, call that classification into question. Contrary to what the Commission appears to suggest, I do not think that, in order to come within the categories listed in Article 52(a) of Directive 2006/112, the stands supplied would have to be uniform in design, rather than fitted out to suit the requirements of each individual exhibitor. (38)

62. I can quite understand that Inter-Mark will need to adapt and fit out its stands according to the nature of the goods or services being offered by the exhibitor and in accordance with the requirements of its customers. An exhibitor presenting books to visitors will, for example, require a stand fitted out with the proper book-display furniture, whilst an exhibitor of wines will need tables and chairs, amongst other things, so that the wine can be tasted.

63. Promoting the products presented by exhibitors to visitors is the very purpose of the activity of a fair (39) and the arrangement of stands is undoubtedly a contribution to the achievement of that objective. According to the abovementioned case-law of the Court, however, an advertising service must have the purpose of disseminating a message informing visitors of the qualities of the products and services offered by the exhibitors.

64. On the basis of the information before the Court, that does not appear to be the situation in the main proceedings, the national court simply stating that Inter-Mark takes into account the individual requirements of its customers, in particular as regards the external appearance and functionality of the stands, and may provide transportation and assembly of the parts of the stand at the place where the event is being held. (40)

65. Consequently, taking all those factors into account, I am of the view that Article 52(a) of

Directive 2006/112 must be interpreted as meaning that the supply of services consisting in the temporary provision of fair stands to exhibitors is a service ancillary to the activities of fairs and exhibitions and thus comes within the scope of that provision.

V – **Conclusion**

66. In the light of the foregoing considerations, I propose that the Court reply as follows to the Wojewódzki S?d Administracyjny w Poznaniu:

Article 52(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the supply of services consisting in the temporary provision of fair stands to exhibitors is a service ancillary to the activities of fairs and exhibitions and thus comes within the scope of that provision.

1 – Original language: French.

2 – OJ 2006 L 347, p. 1.

3 – Council 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) (‘the Sixth Directive’).

4 – See recital 3 in the preamble to Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11). See, also, paragraph 3.1.1 of the Communication of 20 October 2003 from the Commission to the Council, the European Parliament and the European Economic and Social Committee – Review and update of VAT strategy priorities (COM(2003) 614 final).

5 – See recital 17 in the preamble to Directive 2006/112.

6 – Dz. U no 54, position 535.

7 – See Case C-200/98 *X andY* [1999] ECR I?8261, paragraphs 21and 22.

8 – Case C-438/01 [2003] ECR I-5617.

9 – Ibid., paragraph 14.

10 – Ibid., paragraph 15.

11 – Idem.

12 – Case C-114/05 [2006] ECR I-2427.

13 – Paragraph 18 and the case-law cited therein.

14 – Paragraph 25.

15 – Paragraph 27. I would point out that, following the judgment in *Gillan Beach*, the European Union legislature chose to add, with effect from 1 January 2010, services relating to fairs and exhibitions to the list of activities set out in Article 52(a) of Directive 2006/112 (see Article 2(1) of Directive 2008/8).

16 – See paragraphs 34 to 37 of the Commission’s written observations.

17 – See paragraph 37 of those observations.

18 – Case C-222/09 [2010] ECR I-0000.

19 – Paragraph 28.

20 – Paragraph 29.

21 – Emphasis added.

22 – Paragraph 22.

23 – Paragraph 23.

24 – Paragraph 24.

25 – Case C-327/94 [1996] ECR I-4595.

26 – Paragraphs 27 and 28.

27 – Paragraph 29.

28 – See, to that effect, Case C-37/08 *RCI Europe* [2009] ECR I-7533, paragraph 39.

29 – See *Gillan Beach,* paragraph 24.

30 – See paragraph 20 of the Commission's written observations.

31 – Idem.

32 – [1993] ECR I-5881.

33 – Paragraph 16.

34 – Idem.

35 – Paragraphs 17 and 18.

36 – Paragraph 19.

37 – See *Dudda*, paragraph 27.

38 – See paragraphs 20 and 21 of the Commission's written observations.

39 – See *Gillan Beach*, paragraph 25.

40 – See the French version of the reference for a preliminary ruling, p. 3.