OPINION OF ADVOCATE GENERAL BOT

delivered on 13 September 2007 [1]

1. The present infringement proceedings concern provisions of German law which determine the place of supply of services provided by an executor of a will, for the purpose of levying value-added tax ('VAT') on them. German law provides that those services are supplied in the place where the executor carries on his business.

2. The Commission of the European Communities is of the opinion that services must be treated as supplied at the place where the customer has his registered office or place of business, in accordance with the provisions of Article 9(2)(e) of Sixth Council Directive 77/388/EEC [2] and that the customer of those services is the beneficiary under the will.

3. In the present action, the Commission asks the Court to hold that, by failing to determine in accordance with those provisions the place where a supply is deemed to have taken place for tax purposes ('the place of supply for tax purposes') in respect of services provided by an executor, the Federal Republic of Germany has failed to fulfil its obligations.

I — Legal context

A — *Community law*

4. The Sixth Directive harmonises conditions for the application of VAT within the European Union. According to Article 2(1) of that directive, VAT applies to supplies of services which are effected by a taxable person acting as such within the territory of a Member State.

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; 'the Sixth Directive').

5. The place where a service is supplied for VAT purposes is laid down by Article 9 of the Directive. That article seeks to avoid both conflicts concerning jurisdiction as between Member States liable to lead to double taxation and the absence of taxation.

6. Article 9(1) of the Sixth Directive contains a general rule that the place where a service is supplied is that where the supplier has established his principal place of business. Accordingly, under that provision, '[t]he place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides'.

7. Article 9(2) of the Sixth Directive also provides for other criteria for determining the place of supply ('place of supply criteria'). Those criteria may be grouped into two different categories.

8. The first category comprises those supplies capable of being physically attached to a place. That means supplies of services connected with immovable property, transport services, cultural, artistic, sporting, scientific or other activities and, finally, the hiring out of movable tangible property. Those supplies are localised, respectively, in the place where the property is situated, the place where transport takes place, the place where they are carried out and the place where the movable tangible property hired out is used.

9. The second category of supplies uses the customer's country as the criterion for attaching them to a place. Accordingly, under the seventh recital in the preamble to the Sixth Directive, although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should none the less be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods.

10. Those services are listed in Article 9(2)(e) of the Sixth Directive. For example, transfers and assignments of intellectual property rights, advertising services, banking, financial and insurance transactions and the supply of staff are among the services referred to.

11. The services of lawyers and other similar services are also to be found in the third

indent of that provision. Article 9(2) of the Sixth Directive provides as follows:

'However:

...

(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

— services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information,

...'

12. Finally, Article 9(3) of the Sixth Directive provides:

'In order to avoid double taxation, non-taxation or the distortion of competition the Member States may, with regard to the supply of services referred to in 2(e) and the hiring out of movable tangible property consider:

(a) the place of supply of services, which under this Article would be situated within the territory of the country, as being situated outside the Community where the effective use and enjoyment of the services take place outside the Community;

(b) the place of supply of services, which under this Article would be situated outside the Community, as being within the territory of the country where the effective use and enjoyment of the services take place within the territory of the country.'

B — *National law*

13. Paragraph 3a of the Law relating to Turnover Tax (Umsatzsteuergesetz, 'the UStG') is worded as follows:

'(1) A supply of services is effected in the place where the trader carries on his business, subject to Paragraphs 3b and 3f ...

...

(3) Where the customer to whom one of the other services mentioned in subparagraph 4 is supplied is an undertaking, by way of exception to subparagraph 1, the service is deemed to be supplied in the place where the customer carries on his business ...

(4) For the purposes of subparagraph 3, 'other services' shall mean:

...

3. other services as part of the business of a lawyer, ..., of a tax adviser ... and in particular the provision of legal, financial or technical advice:

...'

14. Section 33 of the Guidelines on turnover tax (Umsatzsteuer-Richtlinien) provides that Paragraph 3a(1) of the UStG is to apply to the services of an executor.

15. In accordance with those provisions and their interpretation by the Bundesfinanzhof (Germany), the services of an executor, even when provided by a lawyer, a tax adviser or an auditor, are deemed to be effected in the place where that executor carries on his business.

II — Procedure and forms of order sought

16. The Commission is of the opinion that the place of supply of the services provided

as an executor for customers established outside the Community or for taxable persons established in a Member State other than Germany should be fixed in accordance with the provisions of the third indent of Article 9(2)(e) of the Sixth Directive. It informed the German authorities thereof by letter of formal notice dated 19 April 2005.

17. The Federal Republic of Germany, by letter of 23 June 2005, disputed that assessment on the ground that supplies of services by an executor are not comparable to those of a lawyer or to the other services referred to in the third indent of Article 9(2)(e) of the Sixth Directive.

18. The Commission repeated its analysis that the German legislation is inconsistent with Community law in a reasoned opinion dated 19 December 2005.

19. The Federal Republic of Germany confirmed its position by letter of 2 March 2006.

20. By application received at the Registry on 27 September 2006, the Commission brought the present action. The Federal Republic of Germany lodged its defence at the Registry on 20 November 2006. The Commission lodged a reply and the Federal Republic of Germany lodged a rejoinder.

21. The parties did not request a hearing. The Court also took the view that a hearing was not necessary.

22. The Commission claims that the Court should declare that the Federal Republic of Germany has failed to fulfil its obligations under Article 9(2)(e) of the Sixth Directive by failing to determine the place where an executor's services are supplied in accordance with those provisions, where the services are performed for customers established outside the Community or for taxable persons established within the Community but not in the same country as the supplier.

23. It also claims that the defendant should be ordered to pay the costs.

24. The Federal Republic of Germany contends that those claims should be rejected and that the Commission should be ordered to pay the costs.

III — Arguments of the parties

25. The Commission maintains that the German position is unfounded and that the place where an executor's services are performed must be determined in accordance with the provisions of the third indent of Article 9(2)(e) of the Sixth Directive on the following grounds.

26. In accordance with the case-law, in order to determine whether an activity is covered by those provisions, it is necessary to take into consideration not only the professions which are cited therein, but the services which are habitually carried out as part of those professions.

27. The role of an executor is to carry out the deceased's wishes. His task might therefore be equated with defending the interests of a lawyer's client. He manages a third party's legal affairs. His activity is also of an economic nature. It also requires specific knowledge of inheritance law. It is mainly carried out by lawyers specialising in that subject-matter.

28. An executor's services could also be connected with the 'other similar services' referred to in the third indent of Article 9(2)(e) of the Sixth Directive. For that, it would be sufficient for the activity of an executor to have the same purpose as one of the activities expressly mentioned in that provision. The activities of a lawyer and those of an executor have in common representing the interests of another person. In both cases, the content of the activities is determined by the third party.

29. The Commission also relies on the Guideline, adopted by unanimity by the VAT Advisory Committee, according to which the place of supply of services involving the tracing of heirs must be determined in accordance with the third indent of Article 9(2)(e) of the Sixth Directive. That guideline, even if it is not binding, should be taken into account as evidence of the legislature's intentions. The considerations which led to that position concerning the place of supply of services involving the tracing of heirs apply a fortiori in respect of the services of an executor.

30. The Commission also submits that its position is borne out by the scheme and purpose of Article 9(2) of the Sixth Directive. The purpose of that provision is to situate the place of taxation of the supply of services in the place where that supply is actually effected. An executor's services are carried out in the place where the beneficiary is located, since the executor has the task of

ensuring that the inheritance reaches the beneficiary.

31. Finally, the Commission states that the practical difficulties which might arise from putting its view into effect, where there are a number of beneficiaries residing in different countries, do not go to make up a relevant argument and that the same difficulties are no less present in relation to the activity of tracing heirs.

32. The Federal Republic of Germany disputes that analysis for the following reasons.

33. According to that Member State, the activity of an executor may be carried out by a relative, a beneficiary, or a spouse, or equally by a lawyer, an association, or a legal person such as a trust company or a bank. The executor may be appointed by a will or by a contract of inheritance. His task is to put into effect the intentions of the deceased.

34. An executor may be appointed for various reasons. The purpose can be to protect beneficiaries with little or no experience, to preserve the inheritance of minors until they attain their majority, to prevent disputes between beneficiaries or to discharge obligations and pay legacies.

35. The executor can thus accomplish two different types of task, the disposal of the estate in accordance with the provisions of the deceased's will, a task which comes to an end once that disposal is accomplished, or the management of the estate during a certain period, for example until a beneficiary attains his majority.

36. The Federal Republic of Germany infers from that description that the activities carried out by an executor do not amount to the services of a lawyer, or to other services similar to those, for the purposes of the third indent of Article 9(2)(e) of the Sixth Directive.

IV — Assessment

37. I am not convinced that the infringement proceedings brought by the Commission are well founded.

38. Admittedly, as indicated by that institution, the provisions of Article 9(2)(e) of the Sixth Directive must not be read as an exception to the general rule contained in Article 9(1) of that directive, and thereby narrowly construed. It is settled case-law that Article 9(2) of that directive contains specific

place of supply criteria, and therefore the place of supply for tax purposes in respect of an economic activity must be determined in accordance with that provision and not according to the general rule set out in Article 9(1) of the Sixth Directive, if that activity is covered by one of those criteria. [3]

39. Moreover, it is also accepted that Article 9(2)(e) of the Sixth Directive relates not to professions as such, but to the services principally and habitually provided in the Member States as part of those professions. [4]

40. The question which arises in the present case is thus whether the services carried out by an executor are covered by the specific place of supply criterion set out in the third indent of Article 9(2)(e) of the Sixth Directive, as the Commission submits.

41. It should be remembered that that provision selects as the place of supply for tax purposes in respect of the services that it lists the place where the customer has established his permanent address or usually resides, when those services were performed, first, for a customer established outside the Community who is not a taxable person and, secondly, for a customer who is established within the Community but not in the same country as the supplier and is a taxable person.

42. According to the argument put forward by the Commission, the customer to whom an executor supplies services is the deceased's beneficiary or beneficiaries. I am of the opinion that that argument cannot be accepted for the following reasons.

43. The concept of a 'customer', referred to in Article 9(2)(e) of the Sixth Directive, requires, in my opinion, the existence of a legal relationship between that customer and the service supplier.

44. That requirement stems, first, from the very nature of VAT, which, it should be remembered, is a tax on consumption. It is the purchase of goods or services which constitutes the chargeable event for that tax and which renders it payable by the purchaser, both when he makes his purchase for the pursuit of his business, in his capacity as a taxable person, and when he makes it to meet his own needs as an end consumer.

3 — Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraphs 10 and 11 and the case-law cited.

4 — Case C-145/96 *von Hoffmann* [1997] ECR I-4857, paragraph 17.

45. Thus, under the VAT system, that tax is applied at all stages of production or distribution of goods or services and is payable at each stage of that process, every time that there is a legal relationship between two different parties in which there is a reciprocal performance. [5]

46. The requirement of a legal relationship between the customer and the supplier of services also stems, in my opinion, from the system provided for by Article 9(2)(e) of the Sixth Directive. According to that system, it is the subject of the contract with the supplier which determines whether the service provided for corresponds to one of those listed by that provision. The customer, within the meaning of that provision, is therefore, in my opinion, necessarily the person who is a party to the contract with the supplier.

47. However, when examining the relationships between the deceased's beneficiary or beneficiaries and the executor, it must be observed that those persons have not concluded any agreement. It is the provisions made by the deceased that the executor has undertaken to carry out and it is by the deceased that the services to be effected and their cost have been determined. When the testator dies and the executor's services are to be performed, the only decision for the beneficiary is whether or not to accept his inheritance. That expression of will does not, however, make him a customer for the executor's services, since he determines neither their content nor their price.

48. I note, in that respect, that the Commission, in the arguments by which it seeks to show that an executor's services are akin to those of a lawyer, states that an executor also defends the interests of a client. It accepts, however, in its pleadings that the executor's task is first and foremost to defend the testator's interests.

49. That is the reason why the position of the beneficiary in relation to the executor is, it appears to me, different from that of the beneficiary vis-à-vis a supplier of services involving the tracing of heirs, to which the Commission refers in its pleadings. Vis-à-vis a researcher of that type, the beneficiary really does appear to be a customer. When informed by the researcher of his inheritance rights, the beneficiary is requested by that supplier to make an agreement with him fixing the fee in consideration for which the supplier will inform him precisely of his rights and the means by which he can claim them. In that case there is indeed a contract between the beneficiary and that supplier of services.

5 — Case C-210/04 *FCE Bank* [2006] ECR I-2803, paragraph 34 and the case-law cited.

50. Consequently, the fact that the VAT Advisory Committee considered, in a guideline, that the place of supply for tax purposes in respect of services involving the tracing of heirs was to be determined in accordance with Article 9(2)(e) of the Sixth Directive is not such as to establish that the position defended by the Commission in respect of executors is well founded.

51. Furthermore, unlike the Commission, I am not convinced that locating an executor's services in the non-member country in which the beneficiary — who, necessarily, can only be an end consumer — is situated would have the effect of locating it in the place of the effective use and enjoyment of the services provided.

52. The beneficiary does appear to be the recipient of the executor's services, since, as the Federal Republic of Germany has stated, the executor's duty consists in transferring to the beneficiary the rights which pass to him under the deceased's estate. He also bears the expense thereof, since — save where the testator has chosen to pay the cost of the executor's services during his lifetime — that cost falls to be deducted from the assets of the estate. However, those factors are, in my opinion, insufficient to justify the conclusion that, when the beneficiary has his permanent address or usually resides in a non-member country, the executor's services are actually used or enjoyed outside the Community.

53. In that triangular relationship which links him to the testator and the executor, the role which falls to the beneficiary is, subject to specific provisions by the testator, passive. In general it is not the beneficiary who has decided to use the supplier of services or who has defined his tasks. The beneficiary merely receives what is due to him, in accordance with the task which the testator has determined, without necessarily even having a relationship with the executor. It is for that reason that I do not believe that that situation is comparable, for example, to that of an end consumer residing outside the Community who entrusts the defence of his interests to a lawyer established in a Member State so that that lawyer can represent him before the courts of a non-member country.

54. In other words, there can be effective use or enjoyment of a service, in my opinion, only on the part of a person who has decided to have recourse to the services of a taxable person and might do so for the purposes of the exercise of his professional activity, particularly the production of goods, as envisaged by the Community legislature in the seventh recital in the preamble to the Sixth Directive. [6]

6 — This is why I also do not believe that the testator may be considered to be the customer to whom the executor's services are supplied, for the purposes of Article 9(2)(e) of the Sixth Directive, since the services are carried out only after his death.

55. Finally, the Commission does not show why making the place of supply of an executor's services the place of establishment of that supplier, in accordance with Article 9(1) of the Sixth Directive, would run counter to the objectives of that provision.

56. As I have already pointed out, Article 9 of that directive seeks, in particular, to avoid a failure to tax. Localising the services provided by an executor in the place where that supplier carries on his activities, as provided for under the German legislation at issue, has the effect of taxing in Germany services provided by lawyers established in that Member State who are carrying out such activities, regardless of the place where the beneficiaries reside. The argument put forward by the Commission leads to an executor's services being exempt from tax where the beneficiary lives in a non-member country.

57. In the light of all those considerations, I am of the view that the Commission has not shown that the Federal Republic of Germany has failed to fulfil its obligations under Article 9(2)(e) of the Sixth Directive by failing to determine the place where an executor's services are supplied in accordance with those provisions where services are performed for customers established outside the Community or for taxable persons established within the Community but not in the same country as the supplier.

58. In accordance with the provisions of Article 69(2) of the Rules of Procedure, if the Court follows my Opinion, the Commission will have to pay the costs.

V — Conclusion

59. In view of the foregoing considerations, I propose that the Court should dismiss the present action for failure to fulfil obligations as unfounded and order the Commission of the European Communities to pay the costs.