OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 12 December 1996 *

1. Where a leasing company established in one Member State (the Netherlands) supplies passenger motor vehicles by way of operational leases to clients established in another Member State (Belgium), in which Member State are the leasing services supplied for VAT purposes? To answer this question a reference from a Dutch court calls upon the Court to interpret Article 9 of the Sixth VAT Directive. [1]

I — Legal and factual context

2. Article 9 of the Sixth Directive is concerned with the 'Supply of services'. Paragraph (1) provides:

'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.'

Until its repeal by Article 1(1) of the Tenth Council Directive, [2] Article 9(2)(d) provided that:

'in the case of hiring-out of movable tangible property, with the exception of all forms of transport, which is exported by the lessor from one Member State with a view to its being used in another Member State, the place of supply of the service shall be the place of utilization'.

For the services falling within its scope, which are set out in various indents, when supplied to 'taxable persons established in the Community' but not in the same country as the supplier, Article 9(2)(e) provides that the place of supply 'shall be the place where

* Original language: English.

1 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (hereinafter 'the Sixth Directive'); OJ 1977 L 145, p. 1.

2 — Tenth Council Directive 84/386/EEC of 31 July 1984 on the harmonization of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC — Application of value added tax to the hiring-out of movable tangible property (hereinafter 'the Tenth Directive'); OJ 1984 L 208, p. 58.

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'.

Article 1(2) of the Tenth Directive added the following indent to Article 9(2)(e) of the Sixth Directive, in place of the provision quoted above from Article 9(2)(d):

'— the hiring-out of movable tangible property with the exception of all forms of transport'.

Article 9(3), as amended by Article 1(3) of the Tenth 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 [Article 9] 2(e) and the hiring-out of forms of transport 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.'

3. Article 6(1) of the Wet op de Omzetbelasting 1968 (Law on Turnover Tax 1968, hereinafter 'the Law') [3] of the Netherlands provides that the place where a service is supplied is where the businessman supplying the service resides, is established, or has a fixed establishment from which the service is supplied.

3 — *Staatsblad* 1968, p. 329.

4. ARO Lease BV, [4] the appellant in the main proceedings, is a private company incorporated in the Netherlands. It is engaged in the business of concluding, as lessor, leasing agreements with third parties in respect of passenger motor cars. The majority of these agreements, at the relevant time, had been concluded for a period of three to four years and involved cars that had been leased to persons established in the Netherlands. However, approximately 800 of them concerned clients based in Belgium (hereinafter 'the disputed agreements'). All of the disputed agreements were drawn up at the lessor's office at 's-Hertogenbosch, the Netherlands.

5. According to the Gerechtshof, Amsterdam (Regional Court of Appeal, Amsterdam, hereinafter 'the national court'), ARO has no office in Belgium. In most cases, potential Belgian-based customers are introduced to the lessor by self-employed Belgian intermediaries who receive a commission for their services. Generally, the customer arranges for himself the purchase of the vehicle of his choice from a car dealer in Belgium. The car is subsequently sold by that dealer to ARO, which pays the purchase price. By a separate leasing agreement the lessor makes the vehicle available to the client. The intermediaries in Belgium are thus not involved directly either in the drawing up or the performance of the agreements. Whilst the agreements provide, *inter alia*, that the costs of maintaining the car and paying the relevant Belgian road tax fall upon the customer, the lessor is still required to pay for repairs and assistance in the event of damage to the car. ARO takes out insurance against this risk to protect its interest as owner.

6. At the end of the agreed term of the lease, the lessor gives the customer the option of purchasing the car at a specified price. Whenever the vehicle is not immediately sold on the basis of that price, it is stored at ARO's expense and risk at the premises of a dealer in Belgium, since ARO does not have a depot of its own in that country.

7. Prior to the dispute in the main proceedings, the lessor had always paid VAT in the Netherlands in respect of the leasing of cars in Belgium, since, on the basis of Article 6(1) of the Law and Article 9(1) of the Sixth Directive, it was considered by the competent Netherlands authorities that the place where the relevant services were supplied was in the Netherlands.

8. The lessor's VAT return, for the period comprising November 1993, indicated a sum of HFL 389 753 (hereinafter 'the disputed VAT') as due to the Netherlands authorities in respect of services supplied under the disputed agreements. However, since 18 January 1993, the competent Belgian authorities had notified the lessor that, with effect from 1 January 1993, it was liable to pay VAT in

4 — Hereinafter 'ARO' or 'the lessor'.

Belgium in respect of such agreements. [5] Counsel for ARO stated at the hearing that it was only on 24 October 1994 that the Belgian authorities decided to apply this new policy by demanding the payment of Belgian VAT backdated to January 1993. This retroactive effect was subsequently modified to November 1993. ARO applied unsuccessfully for a reimbursement of the disputed VAT paid in the Netherlands.

9. On appeal to the national court, ARO argued that, since it had both purchased and leased the cars in Belgium, it should, in agreement with the view taken by the Belgian authorities, be regarded as having a fixed establishment in Belgium. The Netherlands authorities, on the other hand, submitted that the lessor had no business establishment in Belgium from which services were supplied with a sufficient degree of permanency, and that the lessor did not have at its disposal there either the personnel or technical means required for concluding leasing agreements. Consequently, ARO had rightly declared and paid the disputed VAT in the Netherlands.

10. The national court, in seeking to determine the place of supply of services in accordance with Article 9(1) of the Sixth Directive, states that the right to a refund of the disputed VAT turns on whether the interested party supplied the services at issue from a fixed establishment in Belgium. Having doubts about the proper interpretation of that provision and, in particular, the relevance of the Court's judgment in *Berkholz*, [6] it decided to refer the following question to the Court:

'Must Article 9(1) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, be interpreted as meaning that a taxable person established in the Netherlands who, as such, makes available to third parties approximately 6 800 passenger cars under operational-lease agreements, of which approximately 800 were purchased and made available in Belgium in the manner and in the circumstances described in paragraphs 2.1 to 2.4 of this judgment, [7] supplies those services from a fixed establishment in Belgium?'

II — Observations submitted to the Court

11. Written observations were submitted by ARO, the Kingdoms of Belgium, Denmark

5 — Letters were sent to all foreign leasing companies known to be operating in Belgium in January 1993 stating the authorities' view that the presence on the national territory of a fleet of vehicles belonging to a foreign leasing company, which were used for effecting taxable operations (namely, the leasing of the vehicles), was sufficient to constitute the exercise of an economic activity and, thereby, a fixed establishment in Belgium.

6 — Case 168/84 *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251.

7 — These circumstances are described in paragraphs 4 to 6 above.

and the Netherlands, the French Republic and the Commission. Oral observations were presented by ARO, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands and the Commission.

III — Analysis

12. The national court, the parties to the main proceedings, the Commission and the Member States which have submitted observations are content that the activities of the lessor may properly be classified as comprising the provision of services. [8]

The applicability of Article 9(1)

(i) Forms of transport

13. Neither of the parties, nor any Member State nor the Commission has suggested that the place of supply of services in the present case falls to be determined pursuant to Article 9(2). None the less, the reasons for the inapplicability of that paragraph cast light on the interpretation to be given to Article 9(1). The observations of the Commission in particular cannot, in my view, be considered without regard to it. The 'hiring-out of movable tangible property' is now one of the services expressly listed in Article 9(2)(e), which, as between taxable persons established in different Member States, is to be regarded as supplied at the place where the customer has established his place of business. Article 1 of the Tenth Directive expressly exempted the hiring-out of 'all forms of transport' from this special rule for movable tangible property. The final recital in the preamble to the Tenth Directive explains this exclusion in the following terms:

'Whereas, however, as regards the hiring-out of forms of transport, Article 9(1) should, for reasons of control, be strictly applied, the place where the supplier has established his business being treated as the place of supply of such services'.

14. This view finds specific support in the judgment in *Hamann*, [9] in which the Court was asked whether ocean-going sailing yachts that were used by their hirers for the practice of the sport of sailing should be regarded as 'forms of transport' for the purposes of the former Article 9(2)(d) of the

8 — At the hearing, France stressed the importance of clarifying the veracity of this classification, since, it contended, some Member States continued to regard car leasing as involving a supply of goods transaction to be taxed pursuant to Article 8 of the Sixth Directive.

9 — Case 51/88 *Hamann* v *Finanzamt Hamburg-Eimsbüttel* [1989] ECR 767.

Sixth Directive, quoted at paragraph 2 above. The Court ruled that 'all forms of transport are outside the scope of the exception laid down for the hiring-out of movable tangible property, which therefore remains subject to the general rule in Article 9(1) of the Sixth Directive'. [10] The Court was satisfied that the purpose of Article 9 was to ensure that '... the place where a service is supplied is in principle, for the sake of simplification, deemed to be the place where the supplier has established his business', but that 'an exception to this must be made in certain specific cases', such as the hiring-out of movable tangible property, in favour of the place where 'the goods hired out are used, in order to prevent distortions of competition which may arise from the different rates of VAT applied by the Member States'. [11] The Court continued by stating that:

'Those considerations do not apply, however, to the hiring-out of forms of transport. Since they may easily cross frontiers, it is difficult, if not impossible, to determine the place of their utilization. However, in each case a practical criterion must be laid down for VAT charging. Consequently, for the hiring-out of all forms of transport, the Sixth Directive provided that the service should be deemed to be supplied not at the place where the goods hired out are used but, in conformity with the general rule, at the place where the supplier has established his business.' [12]

15. The rationale set out in the final recital in the preamble to the Tenth Directive, coupled with the Court's interpretation of the same words as they formerly appeared in Article 9(2)(d) in *Hamann*, provide a clear indication that the intention of the Community legislature was to ensure that the place of supply of services in the case of the hiring-out of 'all forms of transport' would be treated, in the words of the recital, as 'the place where the supplier has established his business'. The Commission accepts in its written observations that the fact that such activities are excluded from the scope of Article 9(2)(e) could, by *a contrario* reasoning, mean that the place of supply of these services is not deemed to be at the place of establishment of the client as such. I think that this insufficiently acknowledges the scheme and clear words of the amendment made to Article 9.

16. The amendment introduced by the Tenth Directive, illuminated by the final recital in its preamble, emphasizes, at the very least, that, as concerns the hiring-out of forms of

10 — Ibid., paragraph 13 of the judgment. The fact that the exclusion is now contained in Article 9(2)(e) makes no material difference.

11 — Paragraph 17 of the judgment.

12 — Paragraph 18 of the judgment. Advocate General Jacobs was of the same view. He stated that 'the purpose of the exclusion from the exception of forms of transport is, in the ordinary case, readily apparent, since where such forms of transport as cars, vans, or even bicycles or horses, may be used across national frontiers, it would be wholly inappropriate to seek to tax the hiring-out of such forms of transport in the "place of utilization"'; paragraph 9 of the Opinion.

transport, *the place where the supplier has established his business* should be regarded as the primary place of supply for the purposes of applying Article 9(1). Article 9(2)(d), before the amendment, excepted the hiring-out of all forms of transport from a rule adopting 'the place of utilization' of the service, and Article 9(2)(e), after the amendment, excepted it from a not entirely dissimilar rule specifying 'the place where the customer has established his business or has a fixed establishment to which the service is supplied'.

(ii) The interpretation of the place of establishment

17. In its written observations the Commission proposes an alternative theory, in the form of an autonomous construction of the notion of 'the place where the supplier has established his business'. It starts from 'the principle of neutrality' of VAT and would determine that place by concentrating on the 'economic reality and not on fortuitous legal constructions'. According to this approach, ARO's car-leasing services would be regarded as being provided not from its office in the Netherlands but, rather, in Belgium, where the clients are canvassed and the cars purchased, delivered, maintained and ultimately resold. It presumes, quite reasonably for those activities — though this does not appear in the order for reference — that payments are made in Belgian francs. This is less probable in the case of lease payments made to ARO. The Commission contends in short that the economic activity is carried on in Belgium. Of course, the activity at issue is car leasing only. In my view, the practical effect of applying such an approach would largely be the same as if the alternative rule provided in Article 9(2)(e) in respect of the hiring-out of movable tangible property were applied, in spite of the express exclusion of the hiring-out of forms of transport.

18. It is interesting to note that, in its proposal for what subsequently became the Tenth Directive, the Commission had proposed the insertion of the following subparagraph into Article 9(1) of the Sixth Directive: [13]

'In the case of the hiring-out of movable tangible property, *other than forms of transport*, the supplier shall be deemed to have established his business at the place where the property is at the time it is actually made available to the customer.'

The Commission was of the view, at the time of that proposal, that 'such a legal fiction should not be created with regard to the

13 — See OJ 1979 C 116, p. 4 (emphasis added).

hiring-out of forms of transport'. [14] The 'legal fiction' was to treat the supplier as being established at the place of supply of services. The approach actually adopted by the Council, though similar in effect, avoided this 'fiction' and designated the place of establishment of the customer as the place of supply. [15]

19. The 'economic-realities' approach advanced by the Commission in support of its flexible interpretation of the notion of the place of establishment would, in my opinion, have the effect of defeating the express will of the legislator. Moreover, as was pointed out by Germany, Article 9(3)(b) permits the taxation of services in the Member State of their 'effective use and enjoyment', but only where the place of supply otherwise applicable under Article 9 points to a third country. In any event, the specific activities cited by the Commission, such as the services provided by the intermediary, the sale and re-sale of the cars and their maintenance are all taxed on their own merits as supplies of goods or services. The hiring-out of forms of transport receives special treatment. Only Article 9(1) applies.

20. It might be the case that the Commission feels that, with the rapid growth of the long-term car-leasing business as an effective alternative to purchasing cars, circumstances have changed since the adoption of the Tenth Directive. It is arguable that the concerns about control, which, as we have already seen (paragraphs 13 and 14 above), underlie the exclusion of the hiring-out of forms of transport from the general rule applicable to the hiring-out of movable tangible property, are less serious in the case of car leasing than they would be, for example, as concerns ordinary car-rental activities, since the lessee under a leasing agreement would normally either be established or, at least, have a fixed establishment at the place where the service is effectively, for economic purposes, supplied. [16] However, all types of hiring-out of forms of transport receive the same treatment. If the Commission feels that the approach adopted in the Tenth Directive is no longer appropriate, it may propose an amending directive to the Council. In the absence of any new directive, the Court clearly can only interpret the current text of the Sixth Directive.

The place of supply of car-leasing agreements

21. The notions of the 'place where the supplier has established his business or has a fixed establishment from which the service is supplied' are offered by Article 9(1) as the primary possible places of supply of services.

14 — Ibid., see the sixth recital in the preamble to the Commission's proposal.

15 — See paragraph 13 above.

16 — In the present case, the national court has stated that the lessees under the disputed agreements are all established in Belgium.

The Commission would attribute an autonomous character to the place where the service provider is established that is distinct from the notion of 'fixed establishment'. In the present case, it is necessary to examine the application of that expression to car-leasing agreements.

(i) Summary of the observations

22. The lessor, the Netherlands and Germany, supported on this point by France, submit that the primary point of reference provided by Article 9(1) is the place where the supplier has established his place of business. It is only if the choice of this place would not lead to a fiscally rational result, or would create a conflict between Member States, that it should be necessary to examine whether the supplier can be regarded as having 'a fixed establishment from which the service is supplied' in another Member State. The lessor, supported by the Netherlands and Germany, refers to the incongruity of relying upon the fixed-establishment criterion in respect of hiring-out of forms of transport, and draws attention to the final recital in the preamble to the Tenth Directive, which proposes 'the place where the supplier has established his business'. The Netherlands contends that in *Hamann* the Court expressly ruled that the place of use of a form of transport cannot constitute a sufficient standard for determining the place of supply of a service comprising its hiring-out.

23. France contends, however, that the purchase, hiring-out and maintenance of the cars in Belgium, coupled with the establishment there of ARO's clients, result in its having a fixed establishment in that Member State. France — unlike the lessor, the Netherlands and Germany — considers the requirements laid down by the Court in *Berkholz* for the application of criteria of fixed establishment, in particular those regarding the existence of the human and technical resources necessary for the provision of the lessor's services, to have been satisfied in this case by the presence in Belgium of agents who act for and on its behalf. Reference has already been made (in paragraphs 15 and 17 to 20 above) to the principal observations of the Commission. At the hearing, it submitted, in the alternative, that ARO could be regarded as having a fixed establishment in Belgium from which its car-leasing services were supplied.

24. The Netherlands regards the number of operations which must be effected in order to lease cars as minimal and, unlike France, views the conclusion of the leasing contracts in the Netherlands as the most important operation. Moreover, in its view, the requirements of *Berkholz* are not met; ARO possesses neither personnel nor an establishment in Belgium. Germany observes that the wording of Article 9(1) regarding 'a fixed establishment' refers to the place from which

the service is supplied and not the place where the acts preparatory to the provision of that service, such as the acts of ARO's Belgian agents, are effected. Neither France nor the Commission, however, views the Netherlands as being sufficiently connected with the disputed agreements for it to constitute a rational place of supply. Moreover, France, supported by the Commission at the hearing, refers to the Opinion of Advocate General Mancini in *Berkholz* as illustrating the usefulness of adopting the criterion of the place of consumption of the services (here Belgium) whenever reliance upon the place of establishment would — as they submit to be the case in the main proceedings — encourage artificial legalistic determinations of the place of supply. [17]

25. Belgium and Denmark reach the same conclusion as France and the Commission by slightly different routes. Belgium submits that the scope of the notions of 'where the supplier has established his business' or has 'a fixed establishment from which a service is provided' should be interpreted having regard both to the context in which they appear and the general principles and objectives underlying the VAT system. In the instant case, it submits, these factors point to the imposition of the VAT at the place where the services are consumed. In the context of car-leasing operations, the presence of a fleet of cars in a Member State where those cars are purchased, rented out and ultimately resold suffices to constitute a fixed establishment. In its view, that conclusion is supported by the human resources utilized in Belgium by the lessor. Denmark, on the other hand, submits that the notions of the place 'where the supplier has established his business' or 'has a fixed establishment' ought not to be construed as only referring to the place where, for legal purposes, the supplier has established or incorporated his business. It contends that the judgment in *Berkholz* requires economic realities to be taken into account when determining the Member State in which VAT should be paid pursuant to Article 9(1).

(ii) Opinion

26. The interpretation of Article 9(1) of the Sixth Directive adopted by the Court in *Berkholz* is, in my view, quite clear. The Court, initially, stated that Article 9 must be interpreted '... within the context of the general scheme of the Sixth Directive', and, having described the relationship between the

17 — The Advocate General stated that when the place where the supplier has established his business does not coincide with the supplier's fixed establishment, he would 'rely on the general principle that value-added tax should be charged at the place of consumption', and that he would 'hence give preference to the criterion which enables the supply of services to be located more accurately. There is no doubt that the more appropriate of the two for that purpose is the criterion of the "fixed establishment" which is clearly more precise'; [1985] ECR 2251, paragraph 2, at p. 2255.

first two subparagraphs, [18] defined the 'object of those provisions' as being, first, the avoidance of 'conflicts of jurisdiction, which may result in double taxation' and, secondly, 'non-taxation, as Article 9(3) indicates, albeit only as regards specific situations'. [19] In so far as Article 9(1) is concerned, the Court stated that 'the place where the supplier has established his business is a primary point of reference inasmuch as regard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State'. [20] First, the notion of the 'place where the supplier has established his business' must be regarded as a Community concept which should be interpreted uniformly so as to avoid such conflicts. [21] Secondly, the requirements of 'certainty and foreseeability' which must be observed whenever 'rules liable to entail financial consequences' are at issue argue against permitting divergent national practices — such as that which currently exists between Belgium and the Netherlands — to influence the determination of the place of supply of services for VAT purposes. [22] Besides, this analysis is confirmed by the description in *Berkholz* of the circumstances when recourse to the second point of reference enumerated in Article 9(1) might be acceptable: [23]

'It appears from the context of the concepts employed in Article 9 and from its aim ... that services cannot be deemed to be supplied at an establishment other than the place where the supplier has established his business unless that establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present.'

27. There is no irrationality in adopting the place of establishment of the supplier as the place of supply of the services of leasing motor cars for VAT purposes. The rationale is explained in *Hamann*. The mere fact that a Member State may suffer financially as a consequence of its application is not relevant. On the contrary, the alternative and — as the

18 — The Court stated that 'Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whilst Article 9(1) lays down the general rule on the matter'; loc. cit., footnote 6 above, paragraph 14 of the judgment. In Case C-327/94 *Jürgen Dudda* v *Finanzamt Bergisch Gladbach* [1996] ECR I-4595, the Court further clarified the relationship by stating that: 'when Article 9 is interpreted, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1)'; paragraph 21 of the judgment.

19 — *Berkholz*, paragraph 14 of the judgment.

20 — Ibid., paragraph 17 of the judgment.

21 — See, for example, as concerns the reference to 'advertising services' in Article 9(2)(e), Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 12 of the judgment.

22 — See, *inter alia*, Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23 of the judgment, and the Opinion of Advocate General Cosmas in Case C-231/94 *Faaborg-Gelting Linien A/S* v *Finanzamt Flensburg* [1996] ECR I-2395, paragraph 12.

23 — Paragraph 18 of the judgment.

Court has clearly stated in *Berkholz* — exceptional fixed-establishment point of reference may only be applied if the conditions prescribed by the Court are satisfied and if, in that eventuality, the application of the place of establishment would be unreasonable. This is illustrated by the approach of the Court to the factual circumstances of *Berkholz*. The first question referred concerned whether the expression 'fixed establishment' could be construed as covering the operation of gaming machines on board a German-registered ship sailing on the high seas. Despite the fact that the supplier 'regularly employ[ed] two workers on the ferries (a) to keep in good order, repair and replace the machines and (b) to empty them and, together with the staff of the [ferry operator], to count the takings', [24] the Court ruled that '[i]t does not appear that the installation on board a sea-going ship of gaming machines, which are maintained intermittently, is capable of constituting such an establishment, especially if tax may appropriately be charged at the place where the operator of the machines has his permanent business establishment'. [25]

28. The Commission seeks to establish a distinction based on the special circumstances of *Berkholz*, namely that, since the ship was registered in Germany and operated by the Bundesbahn (German federal railway company), the place of supply in international waters would in any case have been Germany. I do not think that the Court intended to limit the scope of the *Berkholz* principle to the peculiar circumstances of that case. Indeed, that principle has subsequently been confirmed by the Court.

29. First, in *Hamann*, although no question arose regarding the place of a possible fixed establishment, the Court stipulated the place of establishment of the supplier as the appropriate approach in cases concerning the hiring-out of forms of transport. Secondly, in *Faaborg-Gelting*, as in *Berkholz*, the Court was concerned with the taxation of transactions on board ferries, viz. the supply of meals for consumption. Having determined that such supplies, at least whenever they took the form of restaurant transactions, constituted the supply of services, the Court, referring with approbation to *Berkholz*, ruled that the place of permanent establishment of the operator of the ship affords an appropriate point of reference for VAT purposes. Advocate General Cosmas, in his Opinion in *Faaborg-Gelting*, said that any supposed inappropriateness affecting the place of establishment of the supplier as a point of reference should be based on more

24 — See the Opinion of Advocate General Mancini [1985] ECR 2251, paragraph 1, at p. 2253.

25 — Ibid., paragraph 18 of the judgment.

than a mere difference of approach between national fiscal administrations. [26]

30. However, in the light of the observations submitted, particularly by France and the Commission, I think that it is necessary to examine whether, in the particular circumstances of this case, the application of the fixed-establishment approach might be apposite. Reference has been made to various factual elements which purportedly suffice to link the services provided by ARO with Belgium. However, in my opinion, none of these supposed connections is convincing. Whilst ARO might have canvassed potential Belgian customers through Belgian car dealers, who were also responsible for the physical procurement and supply of the cars to actual customers, I am not convinced that the presence of such intermediaries amounts to 'the permanent presence of ... human resources'. [27] There is nothing in *Berkholz* to indicate that such a broad construction of the notion of 'human resources' was intended or is justified. On the contrary, primary emphasis was placed on 'the place where the supplier has established his business'. Moreover, unlike the activities of Berkholz's employees, the Belgian activities of ARO's intermediaries all constitute separate legal transactions; their services are taxable in Belgium if that is where they have established their business. By the same token, the fact that these dealers provide repair and maintenance services for the cars in Belgium cannot be equated with 'the permanent presence of ... technical resources' belonging to ARO in Belgium. [28] The original sale of the motor cars takes place in Belgium from the place of business of the motor car suppliers.

31. Even if, contrary to the view which I have just expressed, the notion of 'human and technical resources' employed in the Court's case-law may be interpreted expansively to include resources provided by third parties and subject to separate VAT treatment under the Sixth Directive, I would not be convinced that the *service* of leasing cars at issue in this case could realistically be regarded as having been provided *from* a *fixed establishment* in Belgium, since such an establishment would have to be composed of the various Belgian places of business of the numerous agents who provided pre-and post-leasing services on behalf of ARO. The essence of the services provided by ARO comprises the conclusion of the leasing agreements, which clearly occurred in the Netherlands and which undoubtedly involved the use there by ARO of both human and technical resources; contracts cannot be concluded and financial arrangements put in place without the use of considerable resources. Consequently, the Netherlands is the rational place of supply in accordance with the broad scope to be attributed to the notion of 'the place where the supplier has established his business'.

26 — See especially paragraph 20 of the Opinion.

27 — See *Berkholz*, paragraph 19 of the judgment.

28 — Such services are taxable where they are physically carried out (namely Belgium in the present case) in accordance with the fourth indent of Article 9(2)(c); see, generally, with reference to this indent, paragraphs 13 to 18 of my Opinion of 28 November 1996 in Case C-167/95 *Linthorst, Pouwels en Scheres* v *Inspecteur der Belastingdienst/Ondernemingen, Roermond* [1997] ECR I-1195.

IV — Conclusion

32. Accordingly, I recommend that the question referred by the Gerechtshof, Amsterdam be answered as follows:

Article 9(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, should be interpreted as meaning that the place where a taxable person established in one Member State, who makes available to customers resident in another Member State passenger cars pursuant to operational leasing contracts concluded in the first Member State, and who disposes of no personal human or technical resources in the second Member State, should be deemed to supply his services is the place where he has established his business in the first Member State.