JUDGMENT OF THE COURT (Sixth Chamber)
2 May 1996 *

In Case C-231/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Faaborg-Gelting Linien A/S

and

Finanzamt Flensburg

on the interpretation 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 (OJ 1977 L 145, p. 1), in particular Articles 5, 6, 8 and 9 thereof,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch, G. F. Mancini (Rapporteur), F. A. Schockweiler and P. J. G. Kapteyn, Judges,

* Language of the case: German.

Advocate General: G. Cosmas,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and B. Kloke, Regierungsrat in that ministry, acting as Agents,

— the Italian Government, by Professor U. Leanza, Head of the Department for Contentious Diplomatic Affairs of the Ministry of Foreign Affairs, acting as Agent, and I. Braguglia, Avvocato dello Stato,

— the Netherlands Government, represented by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by J. Grunwald, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Faaborg-Gelting Linien A/S, represented by D. Behrens, Rechtsanwalt, Kiel, the German Government, represented by B. Kloke, the Netherlands Government, represented by J. S. van den Oosterkamp, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission of the European Communities, represented by J. Grunwald, at the hearing on 23 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 1 February 1996,

gives the following

Judgment

1 By order of 30 May 1994, received at the Court on 11 August 1994, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation 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 (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive'), in particular Articles 5, 6, 8 and 9 thereof.

2 Those questions were raised in proceedings between Faaborg-Gelting Linien A/S (hereinafter 'FG-Linien'), established in Denmark, and the German tax authorities on the taxation of transactions consisting of the supply of meals for consumption on board ferries providing a scheduled service between the ports of Faaborg (Denmark) and Gelting (Germany).

3 Under Article 5(1) of the Sixth Directive, 'supply of goods' means the transfer of the right to dispose of tangible property as owner. According to Article 6(1), a supply of services is considered to be any transaction which does not constitute a supply of goods within the meaning of Article 5.

4 The determination of the place at which taxable transactions are deemed to be supplied is dealt with by Articles 8 and 9 of the Sixth Directive. Article 8(1)(b) provides as follows:

'1. The place of supply of goods shall be deemed to be:

(a)...

(b) in the case of goods not dispatched or transported: the place where the goods are when the supply takes place'.

5 Article 9(1) reads as follows:

'1. 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.'

6 Taking the view that the restaurant transactions in question constituted supplies of services for the purposes of the Umsatzsteuergesetz (German Law on Turnover Tax, hereinafter 'the UStG'), of which the place of supply is deemed, in accordance with Article 9 of the Sixth Directive, to be the place where the supplier has established his business, FG-Linien did not mention those transactions in the turnover tax returns which it made to the German tax authorities for the years 1984 to 1989.

7 In contrast, the German tax authorities regarded the restaurant operations as supplies of goods within the meaning of the UStG, which are deemed to be carried out, under Article 8 of the Sixth Directive, at the place where the goods are when

the supply takes place. They therefore issued notices of assessment to tax to FG-Linien in respect of the restaurant transactions which took place during the period in question on the ferry when it was within the geographical scope of the UStG.

8 After a complaint brought before the Finanzamt (Tax Office) and an appeal to the Finanzgericht (Finance Court) were dismissed, FG-Linien appealed on a point of law to the Bundesfinanzhof.

9 In its order for reference, the Bundesfinanzhof takes the view that the restaurant transactions are to be regarded as supplies of goods within the meaning of the UStG. It considers that to classify them as such does not conflict, in particular, with Articles 5 and 6 of the Sixth Directive, since they contain no specific provisions classing restaurant transactions as supplies of goods or provisions of services. Since not all Member States class such transactions as supplies of goods, they are exposed to a risk of double taxation, which could be avoided by a uniform interpretation.

10 The Bundesfinanzhof referred the following questions to the Court for a preliminary ruling:

'1. What rules does the Sixth Directive 77/388/EEC contain for the taxation of transactions for the supply of foods for consumption on the spot (restaurant transactions)?

2. If there are no such rules, what rules of Community law apply to restaurant transactions on board means of transport plying between Member States with differing national rules on the place of taxation of such transactions?

3. If there are no such rules of Community law, can individual Member States maintain their differing rules on restaurant transactions or on the place of supply of such transactions, if those Member States by agreement avoid double taxation of the transactions in the individual case?'

11 By its first question, the national court asks essentially whether restaurant transactions constitute supplies of goods within the meaning of Article 5 of the Sixth Directive, which, under Article 8(1)(b), are deemed to be carried out at the place where the goods are when the supply takes place, or whether they are supplies of services within the meaning of Article 6(1), which, under Article 9(1) of the directive, are deemed to be carried out at the place where the supplier has established his business.

12 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.

13 The supply of prepared food and drink for immediate consumption is the outcome of a series of services ranging from the cooking of the food to its physical service in a recipient, whilst at the same time an infrastructure is placed at the customer's disposal, including a dining room with appurtenances (cloak rooms, etc.), furniture and crockery. People, whose occupation consists in carrying out restaurant transactions, will have to perform such tasks as laying the table, advising the customer and explaining the food and drink on the menu to him, serving at table and clearing the table after the food has been eaten.

14 Consequently, restaurant transactions are characterized by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services within the meaning of Article 6(1) of the Sixth Directive. The situation is different, however, where the transaction relates to 'take-away' food and is not coupled with services designed to enhance consumption on the spot in an appropriate setting.

15 Now that it has been established that restaurant transactions carried out on board ferries constitute supplies of services, it is necessary to determine where they are deemed to take place.

16 The Court has consistently held (see Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 17) that, according to Article 9(1), 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.

17 According to the same case-law, it appears from the context of the concepts employed in Article 9 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 particular services are permanently present (*Berkholz*, paragraph 8)

18 This does not seem to apply to a place supplying restaurant services on a ship, especially where, as in this case, the permanent establishment of the operator of the ship affords an appropriate point of reference for the purposes of taxation.

19 The reply to the first question should therefore be that restaurant transactions are to be regarded as supplies of services within the meaning of Article 6(1) of the Sixth Directive, which, under Article 9(1) of the directive, are deemed to be carried out at the place where the supplier has established his business.

20 In view of this answer, there is no need to reply to the national court's second and third questions.

Costs

21 The costs incurred by the German, Italian and Netherlands Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the Bundesfinanzhof, by order of 30 May 1994, hereby rules:

Restaurant transactions are to be regarded as supplies of services within the meaning of Article 6(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, which, under Article 9(1) of the directive, are deemed to be carried out at the place where the supplier has established his business.

Kakouris Hirsch Mancini

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 2 May 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber