Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 February 2019[1]

Case C-568/17

Staatssecretaris van Financiën
against:
L.W. Geelen

(Request for a preliminary ruling submitted by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 77/388/EEC – Article 9(2)(c) and (e) – Directive 2006/112/EC – Article 52(a) – Article 56(1)(k) – Supply of services – Place of taxable transactions – Criterion for determining fiscal competence – Live interactive erotic webcam sessions – Place where the service is physically carried out)

Introduction

1. Value added tax ('VAT') is a consumption tax, and should therefore ideally be levied at the place where the taxable goods or services are consumed. However, in the case of cross-border transactions, especially those involving the provision of services, this entails substantial administrative burdens both for taxable persons and tax authorities. Therefore, the EU VAT Directives have introduced simplified methods for determining the place where services are deemed to be supplied. The determination of that place still poses certain difficulties, however, particularly in the case of complex services and services provided at a distance, such as, in the present case, via web streaming. Regulatory developments in this area have not always kept pace with technological developments and changing market conditions. It is therefore for the courts to interpret the rules in light of technological developments.

Legal framework

EU legislation

2. Pursuant to Article 9 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment,[2] as amended by Council Directive 2002/38/EC of 7 May 2002:[3]

1 Original language: Polish.

2 OJ 1977 L 145, p. 1.

3 Council directive amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services (OJ 2002 L 128, p. 41).

‘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.

2. However:

…

(c) the place of the supply of services relating to:

– cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organisers of such activities, and where appropriate, the supply of ancillary services,

…

shall be the place where those services are physically carried out;

…

(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:

…

– electronically supplied services, inter alia, those described in Annex L;

(f) the place where services referred to in the last indent of subparagraph (e) are supplied when performed for non-taxable persons who are established, have their permanent address or usually reside in a Member State, by a taxable person who has established his business or has a fixed establishment from which the service is supplied outside the Community or, in the absence of such a place of business or fixed establishment, has his permanent address or usually resides outside the Community, shall be the place where the non-taxable person is established, has his permanent address or usually resides.

…’.

3. Article 43 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,[4] in the version applicable to the facts in the main proceedings, provides:

‘The place of supply of services 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’.

4 OJ 2006 L 347, p. 1.

4. Pursuant to Article 52(a) of Directive 2006/112:

'The place of supply of the following services shall be the place where the services are physically carried out:

(a) cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organisers of such activities and, where appropriate, ancillary services;

…'.

5. Pursuant to Article 56(1)(k) of that directive:

'1. The place of supply of the following services to customers established outside the Community, or to 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 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:

…

(k) electronically supplied services, such as those referred to in Annex II;

…'.

6. Finally, Article 57(1) of Directive 2006/112 provides:

'Where the services referred to in point (k) of Article 56(1) are supplied to non-taxable persons who are established in a Member State, or who have their permanent address or usually reside in a Member State, by a taxable person who has established his business outside the Community or has a fixed establishment there from which the service is supplied, or who, in the absence of such a place of business or fixed establishment, has his permanent address or usually resides outside the Community, the place of supply shall be the place where the non-taxable person is established, or where he has his permanent address or usually resides'.

Netherlands law

7. The above provisions of EU law were transposed into Netherlands law in Article 6(1) and Article 6(2)(c)(1) and (d)(10) of the Wet op de omzetbelasting 1968 (1968 Law on Turnover Tax).

Facts, procedure, and questions referred

8. The defendant in the main proceedings, Mr L. W. Geelen, is a taxable person registered for VAT in the Netherlands. He provides services consisting in the organisation and provision of live interactive erotic webcam sessions. The models performing during those sessions are at that time in the Philippines. Mr Geelen provides the models with the hardware and software required for streaming the sessions over the internet. Customers contact the models online after creating an account with an internet service provider for that purpose. These providers charge customers a fee, part of which goes to L. W. Geelen. The sessions are streamed live and are interactive, meaning that customers are able to communicate with the models and ask them to do things. The services provided by Mr Geelen are, in

the main, directed at the Netherlands market.[5]

9. The defendant in the main proceedings did not submit VAT returns in respect of the above services. The tax authority, however, considered these services to be subject to VAT in the Netherlands and issued a notice of additional assessment to tax for the period from 1 June 2006 to 31 December 2009.

10. That notice was annulled by judgment of the court of first instance, which held that the services in question were subject to the provisions of Netherlands law transposing the first indent of Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112 and that they were physically carried out in the Philippines. The tax authority lodged an appeal in cassation against that judgment with the referring court.

11. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1a) Should the first indent of Article 9(2)(c) [of Directive 77/388], or Article 52(a) [of Directive 2006/112], respectively, be interpreted as also covering the provision, in return for payment, of live interactive erotic webcam sessions?

(1b) If question 1(a) is answered in the affirmative, should the phrase "the place where those services are physically carried out" in Article 9(2)(c) [of Directive 77/388] or "the place where the services are physically carried out" in the introductory sentence of Article 52 [of Directive 2006/112], respectively, then be interpreted as meaning that the decisive factor is the place where the models perform in front of the web camera or the place where the [customer] view the images, or could even some other place be envisaged?

(2) Should the twelfth indent of Article 9(2)(e) [of Directive 77/388] or Article 56(1)(k) [of Directive 2006/112] read in conjunction with Article 11 [of Regulation 1777/2005[6]], be interpreted as meaning that the provision, in return for payment, of live interactive erotic webcam sessions can be deemed to be an "electronically supplied service"?

(3) If both question (1a) and question (2) are answered in the affirmative, and the designation of the place of the service according to the relevant provisions of the directives concerned results in a different outcome, how should the place of the service then be determined?'

12. The request for a preliminary ruling was received by the Court on 27 September 2017. Written observations were submitted by the Netherlands and French Governments and the European Commission. The Netherlands Government and the Commission were represented at the hearing on 19 September 2018

5 The request for a preliminary ruling does not indicate clearly whether the ability to use these services is in some way technically limited to the territory of the Netherlands. It appears that this limitation may result from the need to make use of the internet service providers with which Mr Geelen has concluded an appropriate agreement.

6 Council Regulation of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax (OJ 2005 L 288, p. 1).

Analysis

First question, part (a)

13. By part (a) of its first question, the referring court seeks to ascertain whether services such as those provided by Mr Geelen at issue in the main proceedings fall within Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112. Specifically, the question is whether these services relate to entertainment activities within the meaning of those provisions.

14. There seems to be no doubt that the services in question are to do with entertainment.[7] That, in my view, does not require further discussion. However, this does not provide an exhaustive answer to part (a) of the first question,.

15. In my view, the referring court rightly raises the question of whether the aforementioned provisions apply to services which, while providing a form of entertainment, are not performed at a single place and time and with the customers physically present but, for example, as in the present case, at a distance and at a time chosen individually by each customer.

16. The provision in the first indent of Article 9(2)(c) has been in Directive 77/388 since its adoption. It is beyond dispute, in my opinion, that when formulating that provision the legislature did not have in mind services provided at a distance, such as the services at issue in the main proceedings, since such services did not exist at that time. The only ways of providing cultural, entertainment, educational and similar services were to either bring the customers together at the place where the services were physically carried out or to supply them at the place where the customers were located.[8] Therefore, it was not difficult to determine the place where the services were physically carried out. This was also the place of consumption of the services.

17. However, the technological progress that has taken place since that time has led to the emergence of services that allow customers to participate, sometimes even actively, in a cultural, entertainment or other event, at a distance and not necessarily in real time. Thus, the 'unity of action, time and place', to use a reference to classical theatre, is disrupted. The question therefore arises as to whether the possible application to such services of the first indent of Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112 is in accordance with the intention of the EU legislature, as that intention should be interpreted in the context of the new technological developments, and with the objectives of those provisions.

18. A good starting point for the analysis of the objectives to be served by the rules governing the place of supply of services is the explanatory memorandum to the draft of Directive 2008/8/EC.[9] That directive introduced a fundamental reform of EU law as regards the determination of the place of supply of services for VAT purposes.

7 See, to that effect, the judgment of 12 May 2005, *RAL (Channel Islands) and Others* (C-452/03, EU:C:2005:289, paragraph 32).

8 Of course, there were radio and television services at that time. However, those were taxed at the place of establishment of the supplier, which generally coincided with the place from where the programme was broadcast. It is only since the 2002 amendment of Directive 77/388 (see footnote 3 of this Opinion) that the place of supply of such services, where supplied on a cross-border basis, has been considered to be the place of establishment or residence of the customer (see the eleventh indent of Article 9(2)(e) and Article 9(4) of Directive 77/388). However, radio and television services are limited to broadcasting the programme, reception being a matter for the customers, unlike services such as those at issue in the main proceedings where the supplier also makes it possible to receive content and even enables customers to actively participate.

9 Council Directive of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11). Explanatory memorandum (*exposé des motifs*): COM(2003) 822 final.

19. In the introductory part of the explanatory memorandum, the Commission notes that the most desirable situation is that in which services are taxed at the place where the actual consumption takes place. This framework is nevertheless hindered by serious practical difficulties where the services are supplied on a cross-border basis. These difficulties can be overcome relatively easily in the case of services supplied to taxable persons. This is achieved mainly through the so-called reverse charge mechanism.[10] However, this mechanism cannot be applied to non-taxable persons. An alternative would be to oblige service providers to register and account for VAT in each Member State where services are supplied; however, this would impose an excessive administrative burden on them. In addition, in the case of many services, the place of actual consumption is not the place where the services are physically carried out, but rather the place of establishment or residence of the customer, which complicates the matter further by requiring the supplier to identify the customer's place of residence and account for VAT at that place in each case.[11] Because of these practical difficulties, the general principle adopted in Directive 77/388 was that the place of supply of services is the place where the supplier is established. In the draft discussed here, the Commission proposed to maintain this general principle for services supplied to non-taxable persons.

20. There are, however, exceptions to that rule. One of these is the exception concerning cultural, entertainment, education and similar activities, which is of interest in this case. The introduction of this exception achieved two objectives.

21. Firstly, where the activity concerned required the simultaneous physical presence of both customers and suppliers (or in any event the persons providing the service on their behalf) in one place, it was possible to achieve the most desirable solution by taxing the service at the place of its actual consumption without excessive administrative difficulties, since such services are of a one-off nature in that their economic purpose is usually limited to the duration of the service. As a result, the consumption of such services is immediate and occurs at the place where they are supplied. The place of establishment or residence of the customer is therefore immaterial; the supplier only accounts for VAT at the place where the service is physically carried out.

22. Secondly, such services are often complex in nature, since they require a range of intermediate and ancillary services, some of which may be provided directly to final customers, and others, for example, to organisers of the events which comprise the final services. The price of such services may or may not be a component of the overall price of the final service. They may also be supplied by different service providers.[12] Therefore, the application of the general principle of taxation at the place of establishment of the supplier could result in the need to account for VAT on the individual components of the overall service in different Member States. Taxation of these services at the place where they are physically carried out simplifies the case where this place coincides with the place of supply of the final or main service.

23. However, the application of this exception to services provided at a distance, such as those at issue in the main proceedings, does not achieve those objectives.

24. Where the supply of services does not require the simultaneous physical presence of suppliers and customers in the same place, the problem of determining the place where the service is physically carried out arises, which is the subject of part (b) of the first question. However, irrespective of the solution adopted to this problem, the objectives of the exception in question are not achieved.

10 Under that mechanism, it is the customer rather than the supplier who charges VAT at the rate applicable in the place of its establishment and subsequently either obtains the right to deduct input VAT if the purchased services are used for the purposes of its own taxable activities or pays it to the state treasury. In this case, it is assumed that since services purchased by taxable persons are usually used for the purposes of their business, the place of the customer's establishment is at the same time the place of consumption of the service.

11 This applies, for example, to services of a continuous nature as well as services supplied at a distance.

12 See, for example, the judgment of 26 September 1996, *Dudda* (C-327/94, EU:C:1996:355); that case concerned sound engineering services provided to concert organisers.

25. For if we accept, taking as an example the services at issue in the main proceedings, that the place where the service is carried out is the place where the models perform in front of the camera, the desired result of taxation at the place of consumption is not achieved. This is because the place of consumption is, obviously, the place where the customers are located at the time when they use the service. Moreover, the place of supply of services determined in this manner may, as in the present case, not coincide with the place of establishment of the supplier, or even be completely outside the territorial scope of the common system of VAT. As a result, not only will the service not be taxed at the place of consumption, which was the purpose of that exception, but the general principle of taxation at the place of establishment of the supplier will not apply either.

26. On the other hand, if the place where viewers are located at the time when they use such services was deemed to be the place where such services are physically carried out, that would allow those services to be taxed at the place of consumption. This, however, has the potential to create precisely those practical difficulties which the EU legislature sought to avoid by introducing the general principle of taxation at the place of establishment of the supplier, and which arise from the need to identify the place where the service is used by the customer in each case and account for VAT at that place.

27. Although the Netherlands Government points in its observations to the arrangements proposed in Directive (EU) 2017/2455[13] which are intended to address these practical difficulties, that Government itself notes that these arrangements will only apply to services such as those at issue in the main proceedings from 2021, whereas the present case concerns a legal situation which existed between 2006 and 2009.

28. It follows from the foregoing that the application of the special criterion for determining the place of supply of services provided for in the first indent of Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112 to services provided at a distance, such as those at issue in the main proceedings, does not achieve the objectives which the EU legislature intended to achieve by introducing those provisions. It is therefore necessary, in my view, to look elsewhere, and return to the general principle of taxation at the place of establishment of the supplier.

29. It is true that in some cases the application of that principle to services provided at a distance, and in particular online services, may lead to an imperfect distribution of tax powers between the Member States, as it potentially enables the place of taxation to be easily separated from the place of consumption of the service (although that does not appear to be the case here). However, as is apparent from the explanatory memorandum to the draft of Directive 2008/8, the EU legislature was already aware of this problem when preparing the directive, but nevertheless decided to postpone its solution in respect of services supplied to non-taxable persons within the territory of the European Union pending the implementation of the arrangements referred to in point 27 above.

30. The position according to which the purpose of the rules contained in the first indent of Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112 was to determine the place of supply of services which require the simultaneous presence of suppliers and customers also appears to be supported by the current wording of the provisions in question.

31. In the current version of Directive 2006/112,[14] that provision is contained in Article 53 and Article 54(1). According to Article 53 of that directive, which concerns services supplied to taxable persons, 'the place of supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar *events*, *such as fairs and exhibitions*, and of ancillary services

13 Council Directive of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods (OJ 2017 L 348, p. 7).

14 That is, in the version in force from 1 January 2011, in accordance with Article 3 of Directive 2008/8.

related to the admission, supplied to a taxable person, shall be the place where those *events* actually take place'.[15] This provision, therefore, does not refer to any kind of cultural, entertainment or similar services, but to services in the form of events, such as fairs or exhibitions, that is, those which require the presence of customers at the place where the services are supplied.

32. It is true that Article 54(1) of Directive 2006/112, which refers to the supply of the same services to non-taxable persons, does not use the word 'events'.[16] However, that provision, like Article 53 of the directive in question, also specifies that it concerns activities 'such as fairs and exhibitions', and thus also activities which require the presence of customers at the place where the service is supplied.

33. In my opinion, the difference in the wording of these provisions stems from the fact that the current Article 53 of Directive 2006/112 defines the place of supply of a very narrow category of services, namely services which consist in allowing admission to various types of events, such as fairs and exhibitions, and services closely related thereto. The admission fee to such events is usually paid through the purchase of tickets. These tickets are usually sold on a mass scale and are often sold through intermediaries, making it very difficult, if not impossible, to distinguish between buyers who are taxable persons and buyers who are not. Therefore, the legislature has made the place of supply of services related to admission to events supplied to both taxable persons and to non-taxable persons the same in order to avoid difficulty in taxing such services. However, the place of supply of any ancillary services relating to cultural, entertainment and similar activities differs according to the status of the customer: where services are supplied to non-taxable persons, the place of supply is still the place where the service is physically carried out pursuant to the current Article 54(1) of Directive 2006/112, whereas in the case of services supplied to taxable persons, it is the place where the customer has established his business or the customer's fixed establishment under the new general rule set out in the current Article 44 of Directive 2006/112. Therefore, the place where sound engineering services are supplied, for example, such as in *Dudda*,[17] would under the rules currently in force be the place of establishment of the organiser of a concert rather than the place where the concert is held.

34. In my view, however, this does not change the fact that the two provisions cited above concern the same type of service, namely activities 'such as fairs and exhibitions', that is, services requiring the physical presence of the customers at the place where the service is supplied. The scope of the current Article 54(1) of Directive 2006/112 is no broader than the scope of Article 53 as far as the categories of activities covered by it are concerned. Article 53 excludes from the scope of the previous rule only services supplied to taxable persons which do not directly involve giving admission to cultural, entertainment and similar events. However, apart from this exclusion, the services covered are still the same services as referred to in the first indent of Article 9(2)(c) of Directive 77/388 and in Article 52(a) of Directive 2006/112 in the version applicable to the main proceedings. Services provided at a distance are not covered by those provisions.

35. I therefore propose that the Court's answer to part (a) of the first question should be that Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112 must be interpreted as meaning that services consisting in the organisation and provision of live interactive erotic webcam sessions are not entertainment activities within the meaning of those provisions.

15 My emphasis.

16 According to that provision, 'the place of supply of services and ancillary services, relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs and exhibitions, including the supply of services of the organisers of such activities, supplied to a non-taxable person shall be the place where those activities actually take place'.

17 Judgment of 26 September 1996 (C-327/94, EU:C:1996:355).

First question, part (b)

36. The answer that I propose to part (a) of the first question renders part (b) of that question irrelevant. However, in the event that the Court does not accept my proposed answer to part (a) of the first question I shall analyse part (b) of that question below.

37. By part (b) of its first question, the referring court seeks to ascertain whether, in the case of services provided at a distance, such as the live interactive erotic webcam sessions at issue in the main proceedings, it is the place where the models are physically present during the session or the place where the customers use these services that must be regarded as 'the place where those services are physically carried out' within the meaning of Article 9(2)(c) of Directive 77/388 or 'the place where the services are physically carried out' within the meaning of Article 52(a) of Directive 2006/112.

38. At the outset, I would like to point out that, in my opinion, any differences which may exist between the different language versions of the two directives with respect to the wording of Article 9(2)(c) of Directive 77/388 and the wording of Article 52(a) of Directive 2006/112, to which the referring court also draws attention with regard to the Dutch version, do not alter the meaning of those provisions. Those two provisions must therefore be interpreted in the same way.

39. The Netherlands and French Governments propose that the answer to the question should be that the place where the services are physically carried out is the place where the customers use these services, which in this case is, in principle, the territory of the Netherlands.

40. In the Commission's view, however, this approach is dictated by the result which it is intended to achieve, namely, the taxation of the service in question in the Netherlands, but this does not follow from the wording of the provisions analysed. While the Commission shares the view that it would be reasonable to tax those services in the Netherlands, it nevertheless recognises that, though it may be harsh, it is the law (*dura lex sed lex*): the wording of the relevant provisions points to the place where the models perform, in this case the Philippines.

41. This dilemma perfectly illustrates the difficulties involved in trying to apply the rules in question to situations which they were not designed to cover, namely, to services provided at a distance. Unlike services which require the simultaneous presence of the supplier and customer in one place, in the case of services provided at a distance there is, by definition, no single place which can be clearly and unequivocally regarded as the place of supply of the services, since the very essence of these services lies in the fact that they are supplied in at least two different places and, more specifically, *from* one place *to* another.

42. However, I believe that in order to resolve this dilemma it is necessary to answer two questions: who is the supplier in this case and what the service actually involves.

43. As regards the first question, it appears from the information included in the request for a preliminary ruling that the models are employed by Mr Geelen. Although the referring court does not specify the precise nature of their employment, in my opinion it may reasonably be concluded that the models do not provide services directly to Mr Geelen's customers. Mr Geelen is therefore the supplier; it is he who charges the price for his service [18] and it is the taxation of the service supplied by him that is the subject of the main proceedings.

18 Via, as it appears, internet service providers.

44. This service is described in the request for a preliminary ruling as the provision of live interactive erotic webcam sessions. There appear to be two essential elements to a service defined in this manner: erotic sessions as such (i.e. performances by the models) and their streaming over the internet together with the enabling of interactive communication.

45. Both these elements combine to make up a single, indivisible service. Mr Geelen does not merely provide performances by the models, since such a service would be of no value to his customers given that the latter are located in the Netherlands, while the models are in the Philippines. Nor is Mr Geelen's role limited to mediation in the streaming of these sessions, as he also organises the sessions in which the models perform and provides them with the necessary hardware and, it is reasonable to assume, pays them remuneration.

46. Both of these elements are equally important, since without either of them the service would not make economic sense and would in any event be a completely different service.

47. Returning to the provisions that are at issue in the present case, it should be noted that they concern services which relate to entertainment, cultural or similar *activities*. However, as the place of supply of those services, those provisions indicate not the place where those activities are carried out, but rather the place where the *service* is supplied. The place where the activity which is the subject of the service, in this case entertainment activity in the form of performances by models, is carried out is therefore not sufficient for the purpose of determining the place where the service is carried out if other, equally important, elements of the service are supplied elsewhere.

48. Therefore, I do not share the Commission's view that the place where the models perform must be considered to be the place of supply of the services at issue in the main proceedings. This is because this view completely disregards the fact that the economic value of this service for customers consists in their ability to use it at a location of their choice, including, inter alia, their place of residence, and that from that point of view, the fact that the session can be streamed is as important a part of the service as the models' performances.

49. However, it is just as difficult to accept, as the Netherlands and French Governments argue, that the place where customers use the service is the place where the service is physically carried out, since none of the activities which comprise the service are actually performed there.

50. Therefore, the obvious answer to the question of where a service consisting, on the one hand, in the organisation of performances by models in erotic sessions, and on the other, in enabling those sessions to be viewed anywhere via the internet and also enabling interactive communication with the models, is physically carried out is that that place is the place of establishment of the supplier, namely Mr Geelen in this case, since that place is the focus of all activities, performed at a distance, which are necessary for the supply of those services.

51. I therefore take the view that, in the case of services provided at a distance, that is, those which do not require the presence of the customer at the place where the activities comprising the service are physically carried out, the place of establishment of the supplier must be regarded as the place where that service is physically carried out within the meaning of Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112. I should emphasise here that the place in question is the place of establishment of the supplier rather than of the persons whom the supplier may have employed to provide certain component services which make up that service.

52. It is not difficult to see that this conclusion calls into question the point of applying to such services the exception contained in Article 9(2)(c) of Directive 77/388 and in Article 52(a) of Directive 2006/112, since it leads in practice to the same result as applying the general principle of taxation at the place of establishment of the supplier. However, this is due to the fact that these rules are not applicable in the case of services provided at a distance, as I have attempted to demonstrate in my analysis of part (a) of the first question.

53. Nor does this interpretation automatically result in taxation at the place of consumption, since that place may, in the case of services provided at a distance, be different from the place of establishment of the supplier. However, as I pointed out in the part of this opinion concerning the answer to part (a) of the first question, in respect of services provided to non-taxable persons, the EU legislature considered preventing difficulties and administrative burdens for taxable persons to be more important than taxing those services at the place of consumption.[19] In contrast to the solution proposed by the Netherlands and French Governments,[20] my proposed solution avoids these difficulties and burdens.

54. In view of the above, should the Court not accept my proposed answer to part (a) of the first question, I propose that the answer to part (b) of the first question should be that Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112 must be interpreted as meaning that, in the case of services provided at a distance, that is, services not requiring the customer's presence at the place where the activities comprising the service are physically carried out, the place of establishment of the supplier must be regarded as the place where such a service is physically carried out within the meaning of those provisions.

Questions 2 and 3

55. By its second and third questions, the referring court seeks to ascertain whether services such as those at issue in the main proceedings can be considered to be electronically supplied services within the meaning of the last indent of Article 9(2)(e) of Directive 77/388 and Article 56(1)(k) of Directive 2006/112 and, if so, how the place of supply of those services is to be determined if that classification coincides with the classification of those services as covered by Article 9(2)(c) of Directive 77/388 and Article 52(a) of Directive 2006/112.

56. It should be noted, in any event, that Article 9(2)(e) of Directive 77/388 governs the determination of the place of supply of the services listed in that provision that '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'. Additionally, Article 9(2)(f) of the directive governs the determination of the place of supply of the services referred to in the last indent of point (e) of that provision (namely, electronically supplied services) 'supplied when performed for non-taxable persons who are established, have their permanent address or usually reside in a Member State, by a taxable person who has established his business or has a fixed establishment from which the service is supplied outside the Community or, in the absence of such a place of business or fixed establishment, has his permanent address or usually resides outside the Community'.

57. Article 56(1) and Article 57(1) of Directive 2006/112 have the same scope.

19 See point 19 of this Opinion.

20 In the main proceedings, it appears that the use of the services provided by Mr Geelen required the opening of an account with an internet service provider with which he had concluded an appropriate agreement, and Mr Geelen therefore had control over the territorial scope of his services. In general, however, services provided at a distance, and in particular over the internet, can be used without geographical restrictions. Accordingly, to conclude that the place of supply of such services, and consequently the place of their taxation, is the place where they are used by customers, could potentially lead to serious difficulties for suppliers due to the multiple places of taxation.

58. Thus, these provisions apply to: the 'export of services', that is to say, the supply of services to customers established or residing outside the European Union, the cross-border supply of services within the territory of the European Union to taxable persons, and the 'import of services' which are supplied to non-taxable persons by taxable persons who have a place of business or establishment or reside outside the European Union.

59. However, the main proceedings concern the supply of services to non-taxable persons resident in the Netherlands by a taxable person who is also resident in the Netherlands. There is nothing in the request for a preliminary ruling to indicate that Mr Geelen had a fixed place of business outside the European Union or that he engaged in the export of services or supplied his services (those at issue the main proceedings) to taxable persons on a cross-border basis. In particular, the fact that the models perform outside the territory of the European Union (in the Philippines) does not mean that the case at issue concerns imports of services, since the supplier is Mr Geelen. [21]

60. Therefore, the services provided by Mr Geelen are not covered by Article 9(2)(e) and (f) of Directive 77/388 or by Article 56(1) and Article 57(1) of Directive 2006/112. Thus, the classification of those services as electronically supplied is irrelevant. As a result, there is no need to answer the second and third questions.

61. It is true that the current version of Article 58(c) of Directive 2006/112 specifically governs all services supplied electronically to non-taxable persons, including those supplied within the territory of a single Member State, but that provision does not apply to the facts in the main proceeding. It is the legal provisions examined in the previous points of this Opinion that are relevant in the present case.

Conclusions

62. In view of all of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, Netherlands) as follows:

Article 9(2)(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2002/38/EC of 7 May 2002, and Article 52(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in the version applicable until 31 December 2009, must be interpreted as meaning that services consisting in the organisation and provision of live interactive erotic webcam sessions do not constitute a supply of services relating to entertainment activities within the meaning of those provisions.

21 See point 43 of this Opinion.