JUDGMENT OF THE COURT (Second Chamber)
15 March 1989 *

In Case 51/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Hamburg for a preliminary ruling in the proceedings pending before that court between

Knut Hamann, residing in Hamburg,

and

Finanzamt (Tax Office) **Hamburg-Eimsbüttel,**

on the interpretation of Article 9(2)(d) 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 (Official Journal 1977, L 145, p. 1),

THE COURT (Second Chamber)

composed of: T. F. O'Higgins, President of Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: F. G. Jacobs
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Knut Hamann, the plaintiff in the main proceedings, by P. Müller-Kemler, Rechtsanwalt, Hanover,

the Finanzamt Hamburg-Eimsbüttel, the defendant in the main proceedings, by its Director, in the written procedure,

* Language of the case German

the Government of the Federal Republic of Germany, by M. Seidel, Ministerial Adviser at the Federal Ministry of Economic Affairs, assisted by J. Sedemund, Rechtsanwalt, Cologne,

the Commission of the European Communities, by M. D. Calleja, a member of its Legal Department, assisted by R. Wagner, a civil servant seconded to the Commission under the exchange programme for civil servants,

having regard to the Report for the Hearing and further to the hearing on 14 February 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 February 1989,

gives the following

Judgment

1 By an order of 22 December 1987, which was received at the Court on 17 February 1988, the Finanzgericht Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 9(2)(d) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization of the legislation of the Member States on turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1; hereinafter referred to as 'the Sixth Directive').

2 That question was raised in proceedings between Knut Hamann and the Finanzamt (Tax Office) Hamburg-Eimsbüttel (hereinafter referred to as 'the Finanzamt') concerning the question whether the chartering of ocean-going sailing yachts for sporting purposes by an undertaking established in the Federal Republic of Germany is subject to value-added tax (hereinafter referred to as 'VAT') in that State.

3 According to the documents relating to the main proceedings, Hamann owns a yacht-charter business established in the Federal Republic of Germany. The yachts were chartered for sailing, primarily in Danish and Swedish waters but also as far away as Norway and Finland and were therefore used by the charterers mainly outside German tax jurisdiction.

4 For the 1980 and 1981 financial years, Hamann declared a turnover net of tax which was accepted by the Finanzamt, subject to verification.

5 During an inspection carried out in 1983, the tax inspector considered that the chartering by Hamann of ocean-going sailing yachts was a hiring-out of a form of transport which should be regarded as a taxable service supplied in Germany; he therefore calculated the VAT payable for 1980 and 1981. The Finanzamt confirmed the inspector's interpretation and issued revised assessment notices for 1980 and 1981.

6 After his objection was rejected, Hamann brought an action before the Finanzgericht Hamburg. He argued that the chartering of ocean-going sailing yachts was not subject to VAT under the German legislation on the ground that the turnover had occurred at the place where the goods hired out were used and therefore outside German tax jurisdiction. The rule laid down in German legislation for the hiring-out of forms of transport, whereby such hiring-out was deemed to be the place where the lessor pursued his business, was not appliable in this case since ocean-going sailing yachts were not to be regarded as means of transport.

7 The Finanzamt, however, considered that ocean-going sailing yachts were forms of transport within the meaning of the German legislation and that the hiring-out of such goods was therefore subject to VAT at the place where the lessor had established his business, that is to say within the territory of the Federal Republic of Germany.

8 The Finanzgericht Hamburg considered that the rule governing the hiring-out of forms of transport was introduced into the German legislation in order to transpose the Sixth Directive into national law.

9 Taking the view that the dispute involved the interpretation of the relevant Community rules, the Finanzgericht Hamburg decided, by order of 22 December 1987, to stay the proceedings pursuant to Article 177 of the EEC Treaty until the Court had given a preliminary ruling on the following question:

'Is Article 9(2)(d) of the Sixth Directive to be interpreted as meaning that ocean-going sailing yachts that are used by their hirers for the practice of the sport of sailing are to be regarded as "forms of transport" within the meaning of that directive?'

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the law applicable, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 It should be noted first of all that Article 9(1) of the Sixth Directive provides that: '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'.

12 Secondly, it should be noted that Article 9(2) of the Sixth Directive lays down a number of exceptions to this general rule. In particular, Article 9(2)(d) provides 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 it being used in another Member State, the place of supply of the service shall be the place of utilization'.

13 It follows from that provision 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.

14 In order to answer the question asked by the national court, it is necessary to determine whether ocean-going yachts that are chartered for the practice of the sport of sailing are forms of transport within the meaning of Article 9(2)(d) of the Sixth Directive.

15 In this connection Hamann states that the definition of the term 'form of transport' depends upon the main function of the object in question. The main purpose of the chartering of an ocean-going sailing yacht is not to transport persons and goods from one place to another but to practise the sport of sailing or to sail for pleasure. Consequently, the yachts concerned in the main proceedings are not to be regarded as forms of transport within the meaning of Article 9(2)(d) of the Sixth Directive.

16 The Commission, however, considers that the term 'form of transport' must be interpreted widely and that it covers anything which may be used to go from one place to another. According to the Commission, any sailing boat suitable for sailing is therefore a form of transport within the meaning of the Sixth Directive even if it is used primarily for the purposes of sport.

17 The Commission's argument must be accepted. It is clear from the seventh recital in the preamble to the Sixth Directive that one of the aims of the directive was to delimit in a rational way the scope of the legislation of Member States, in particular as regards the supply of services. Thus 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. However, according to the aforesaid recital, an exception to this general rule must be made in certain specific cases: thus in the case of the hiring-out of movable tangible property, the place of supply of the service is the place in which 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.

18 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.

19 In view of the reasons for the exclusion of all forms of transport from the exception laid down in Article 9(2)(d) of the Sixth Directive and the fact that exceptions to the general rule laid down by the Sixth Directive must be interpreted narrowly, ocean-going sailing yachts, even if used by the hirers for sporting purposes, must thus be regarded as forms of transport within the meaning of the aforesaid provision of the Sixth Directive. Yachts of that kind enable persons and goods to be moved over long distances, so that it is difficult to determine the place where they are used and therefore deeming the place where the service is supplied to be the place where the goods are used entails the risk that no VAT would be paid on the hiring-out of such vessels, contrary to the aim of the Sixth Directive.

20 This interpretation is confirmed by Article 15(2) of the Sixth Directive, according to which 'pleasure boats' — the category to which ocean-going sailing yachts belong — are 'means of transport for private use'.

21 The same interpretation was also adopted in Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (Official Journal 1983, L 105, p. 59), Article 1(1) of which provides that 'pleasure boats' are within the scope of the directive and are therefore covered by the term 'certain means of transport'.

22 The answer to the question raised by the national court must therefore be that ocean-going sailing yachts that are used by their hirers for the practice of the sport

of sailing are 'forms of transport' within the meaning of Article 9(2)(d) of the Sixth Directive.

Costs

23 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question submitted to it by the Finanzgericht Hamburg, by order of 22 December 1987, hereby rules:

Ocean-going sailing yachts that are used by their hirers for the practice of the sport of sailing are 'forms of transport' within the meaning of Article 9(2)(d) 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.

O'Higgins Mancini Schockweiler

Delivered in open court in Luxembourg on 15 March 1989.

J.-G. Giraud
Registrar

T. F. O'Higgins
President of the Second Chamber