REPORT FOR THE HEARING
delivered in Case 51/88 *

I — Facts and written procedure

1. 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 (Official Journal 1977, L 145, p. 1; hereinafter referred to as 'the Sixth Directive') provides that the place where a service is supplied is to 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. However, under Article 9(2)(d), in the case of the 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 is to be the place of utilization.

2. The Sixth Directive was amended by the 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 (Official Journal 1984, L 208, p. 58; hereinafter referred to as 'the Tenth Directive'). The Tenth Directive was intended to enter into force by 1 July 1985. The fourth recital in its preamble states that, 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.

3. In the course of his business, the plaintiff in the main proceedings, Knut Hamann, hired out (uncrewed) ocean-going sailing yachts in 1980 and 1981 — the years to which the dispute relates.

4. The charterers took possession of the yachts in their home port of Kiel (Federal Republic of Germany) and generally left German territorial waters to go sailing mainly in Danish and Swedish waters, but also as far away as Norway and Finland. They come back just before the expiry of the charter period in order to return the yachts, which were thus mainly used outside German tax territory.

5. In respect of the financial years 1980 and 1981 Knut Hamann declared a turnover net of tax, which was accepted by the Finanzamt (Tax Office) Hamburg-Eimsbüttel subject to verification in accordance with German tax legislation.

6. In the course of an inspection in 1983, the inspector took the view that the offering of ocean-going yachts on charter

* Language of the case: German.

constituted a hiring-out of a means of transport, which had to be treated as a taxable service provided in Germany. Accordingly, he calculated the appropriate turnover tax for the financial years 1980 and 1981. The Finanzamt upheld the inspector's interpretation and drew up notices of revised assessment in respect of 1980 and 1981.

7. Knut Hamann brought an action before the Finanzgericht Hamburg against the decision of the Finanzamt, which had rejected his complaints. He argued that the chartering of ocean-going yachts is not subject to turnover tax, by virtue of Paragraph 1 of the German Umsatzsteuergesetz (Turnover Tax Law) of 1980, because he had realized a non-taxable turnover outside German tax territory, movable tangible property being deemed to be hired out at the place where it is used. The exception laid down for 'forms of transport' did not operate because ocean-going yachts were not such means of transport.

8. The Finanzamt, on the other hand, considered the ocean-going yachts to be means of transport for the purposes of German legislation, and concluded that the hiring-out of such goods was an activity to be taxed at the place where the lessor had established his place of business — in this case, on German territory.

9. The Finanzgericht Hamburg took the view that the special rule in respect of the hiring-out of means of transport was inserted into the 1980 Umsatzsteuergesetz in order faithfully to transpose the Sixth Directive into national law.

10. The Finanzgericht Hamburg held that the dispute involved the interpretation of the relevant Community legislation, and accordingly, by order of 22 December 1987, decided pursuant to Article 177 of the EEC Treaty to stay the proceedings until the Court of Justice 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?'

11. The order of the Finanzgericht Hamburg was lodged at the Court Registry on 17 February 1988.

12. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 6 May 1988 by the Commission of the European Communities, represented by Daniel Calleja, a member of its Legal Department, assisted by Reinhard Wagner, a German judge attached to the Commission as part of the exchange programme for officials, on 11 and 17 May 1988 by the Director of the Finanzamt, on 13 May 1988 by Knut Hamann, the plaintiff in the main proceedings, represented by P. Müller-Kemler, Rechtsanwalt, Hanover, and on 16 May 1988 by the Government of the Federal Republic of Germany, represented by Martin Seidel, Ministerial Adviser at the Federal Ministry of Economic Affairs, assisted by Jochim Sedemund, Rechtsanwalt, Cologne.

13. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate

General the Court decided to open the oral procedure without any preparatory inquiry.

14. Pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court, by a decision of 27 October 1988, assigned the case to the Second Chamber.

II — Written observations submitted to the Court

1. Knut Hamann, the plaintiff in the main proceedings, points out that the interpretation of the term 'forms of transport' is a matter of controversy in the Federal Republic of Germany. He explains that the most meticulous attempt so far to define the term has been made by the Finanzgericht (Finance Court) Schleswig-Holstein in its judgment of 29 September 1983. In order to classify objects capable of use as either sporting means of transport or sports equipment serving as a means of transportation, the main criteria should, according to the decision of the Finanzgericht, be the inherent qualities and functional purpose which give the equipment its essential character according to prevailing public opinion and the circumstances of the case. The Finanzgericht accepted that sailing boats do not *a priori* belong within the category of 'forms of transport'. The transportation of yachtsmen and of their equipment and cargo to any given place is, in principle, merely the factual result and not the purpose, certainly not the main purpose, of sailing. The main purpose in chartering an ocean-going yacht lies in the pursuit of sport and relaxation. The movement of persons and things is merely subsidiary and concomitant, put up with because it would otherwise be impossible to practise sailing at all. On those grounds a sailing boat is, according to the judgment quoted, primarily an item of equipment for sport and leisure and not a means of transport for the purposes of tax legislation.

Mr Hamann concedes that the Bundesfinanzhof (Federal Finance Court) took a different view in its judgment of 8 December 1983 in which it ruled that transportation is a consequence of the movement of a conveyance and that transportation by a conveyance (designed for that purpose) occurs even when the reason for sailing is not the pecuniary exploitation of a sea voyage but the pursuit of a sporting activity or other purposes connected with the organization of leisure. Nevertheless, Mr Hamann takes the view that, if all the implications of that judgment were accepted, there would be some absurd results; he cites the example of a hired windsurfer, racing bicycle or racing-car, and also refers to a regulation of the Federal Transport Minister of 7 April 1981 on the commercial hiring-out and use of pleasure craft in coastal waters (*Bundesgesetzblatt* 1981, p. 343), which expressly takes into account the sporting or relaxation purposes for which pleasure craft are used.

In conclusion, Mr Hamann takes the view that, for the purposes of the law on turnover tax, a 'form of transport' can only mean an object whose main function is to transport persons or things from one place to another — that is, to provide a transport service. If, on the other hand, one considers solely whether the object and the persons and things in it or on it move from place to place, one moves further away from the concept of 'form of transport'. The main purpose of using a sailing yacht, in particular an ocean-going yacht, is not to transport persons or things from one place to another but solely to practise sailing. Someone looking for a means of transportation from Kiel to Copenhagen, for

example, would certainly not choose a sailing yacht.

Accordingly, the plaintiff in the main proceedings suggests the following answer to the question referred to the Court:

'Article 9(2)(d) of the Sixth Directive must be interpreted as meaning that ocean-going sailing yachts that are used by their hirers for the practice of the sport of sailing are not to be regarded as "forms of transport" within the meaning of that directive.'

2. The Finanzamt, the defendant in the main proceedings, argues that the exemption in the Sixth Directive for means of transport was created for the sake of simplifying taxation so as to avoid insuperable practical problems of demarcation and proof. The desire for simplification underlying those provisions calls for a broad interpretation of the term 'form of transport', so as to apply to any object serving to transport persons or things when the determination of its place of use would involve practical difficulties. In support of its opinion the Finanzamt quotes the opinion of the Advisory Committee on Value-Added Tax of 22 September 1983. In enumerating 'forms of transport', that opinion included not only boats for sport and pleasure but also bicycles and saddle-horses, which are usually, and almost exclusively, hired out for the purposes of sport, recreation or leisure. The Finanzamt observes that the interpretation of 'forms of transport' advocated by Knut Hamann overlooks the fact that all transport, regardless of the means used, is not intended merely for locomotion but seeks primarily, and necessarily, the attainment of other aims, with the result that any distinction by reference to the principal and the secondary aim of such locomotion is neither possible nor practicable.

3. The Government of the Federal Republic of Germany claims that the question referred to the Court should receive an affirmative answer. Such an interpretation is indicated by the generally accepted view of the term 'forms of transport', and also by the fundamental purpose of the rule contained in Article 9 of the Sixth Directive. Since the Community legislature has not defined the term at issue, it clearly relied on consistent linguistic usage and standard administrative practice, which had long prevailed in the Member States. According to that linguistic usage, it is an essential feature of a means of transport that it should serve to move persons and goods from place to place, such movement being necessarily the intrinsic, or the main, object of the activity. Accordingly, there are two conditions essential to the concept of 'forms of transport': the means of transport must be immediately suitable for locomotion and must be used, as intended, for the transportation of persons or objects. According to the Federal German Government, a sailing yacht fulfils both the conditions to be met by a means of transport, even if it is used solely for the sport of yachting. The purpose of the transportation is irrelevant. According to the Sixth Directive, the hiring-out of property is taxed as a supply of services, irrespective of the extent and manner of its use. The set of rules laid down in Article 9 of the directive does not concern the question whether or not the property was actually used, but confines itself to determining the place of taxation.

That interpretation is borne out by Article 15(2) of the Sixth Directive, which expressly

identifies 'pleasure boats' as a means of transport. It is also supported by the Advisory Committee on Value-Added Tax, which, during its 12th sitting on 30 June and 1 July 1987, ruled in favour of classifying sports boats and pleasure boats as means of transport.

4. The Commission submits that, in order to avoid conflicts of jurisdiction in cases in which a supply of services is liable to be governed by the legal system of more than one Member State, Article 9(1), in derogation from the strict principle of territoriality, lays down the general rule under which the place where a service is supplied is deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied; Article 9(2), however, qualifies that general rule by introducing a number of exceptions in respect of specific services for which the fictitious identification of the supplier's business premises as the place of supply would be inappropriate, and with regard to which it sets out other determining criteria. According to the Commission, the *a contrario* conclusion to be drawn from Article 9(2)(d) means that the place where a service consisting in the hiring-out of means of transport is supplied is always the supplier's place of business, by virtue of the principle laid down in Article 9(1).

Turning to the question whether the expression 'forms of transport' is applicable to a sailing boat, the Commission takes the view that such is indeed the case. It concedes that the expression 'forms of transport' is not expressly defined in the Sixth Directive. None the less, it maintains that it is a Community concept which must be interpreted broadly. Such an interpretation, which may be inferred from the general term used in the German version of the directive ('außer Beförderungsmittel'), is confirmed by the other language versions, which refer to means of transport of all kinds. Article 15(2) of the directive supports that interpretation; the phrase 'or any other means of transport' clearly shows that pleasure boats are means of transport for the purposes of the Sixth Directive. The Commission states that in all the language versions the Community legislature chose a broad and general wording which must be construed in accordance with general usage. By using the term 'all forms of transport', the Community legislature intended to extend the provision to a range of conveyances capable of performing the function of transportation, and the expression 'all forms of transport' includes sailing craft suitable for marine navigation beyond national territorial waters, even if used primarily for the sport of sailing. A sailing boat is therefore always a form of transport if it is possible to travel from one place to another with it. Such is indeed the case with ocean-going sailing yachts.

The Commission points out that in 1981 the Advisory Committee on Value-Added Tax decided unanimously in favour of a broad interpretation of the term 'forms of transport' and that most of the delegations took the view that the term covered pleasure boats.

The Commission further refers to 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), which provides for the grant of an exemption from turnover tax and any other consumption tax on the importation of certain means of transport, including pleasure boats. The Commission takes the view that the term 'pleasure boat' covers the boats concerned in this case.

According to the Commission, that interpretation is also in keeping with the spirit of the directive. The statement of reasons for the Commission's proposal for the Sixth Directive shows that Article 9(1) deems the place where a service is supplied to be the business premises or permanent address of the supplier essentially for the sake of simplification and in order to avoid all the difficulties of interpretation which could arise from the phrase 'place of the use or enjoyment of a service'. On the other hand, in the case of the hiring-out of movable tangible property, with the exception of forms of transport exported by the lessor from one Member State with a view to its being used in another Member State, it is the place of utilization which is regarded as the place where the service is supplied. That appeared necessary in order to avoid distortions in competition which were liable to arise from different rates of value-added tax. Such considerations, however, do not apply to means of transport. If it were otherwise, there would be problems of monitoring, because the property in question is, by definition, movable and hence can cross frontiers with ease. The problem of supervision arises in the case of the pleasure boats at issue here as much as it does for other means of transport. An interpretation different from the one proposed by the Commission would give rise to precisely the problems which the simplifying rules in Article 9 of the Sixth Directive were designed to avoid.

Lastly, the Commission points out that in this case the boats are not 'exported by the lessor from one Member State with a view to [their] being used in another Member State', as envisaged in Article 9(2)(d). Instead, the charterers take possession of the boats in the home port of Kiel. There cannot therefore be any derogation from the principle laid down in Article 9(1) of the directive, even if yachts were not regarded as means of transport for the purposes of that provision.

In the light of all those considerations, the Commission proposes the following answer to the question referred to the Court:

'Article 9(2)(d) of the Sixth Directive is 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 provision of the directive.'

F. A. Schockweiler
Judge-Rapporteur