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Judgment of the Court of 21 June 1988. - Commission of the European Communities v Italian Republic. - Exemption from value-added tax for imports of free samples of low value - Transposition into national law of Directive 77/388/EEC. - Case 257/86.

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Keywords

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Community law - Principles - Legal certainty and the protection of individuals - National legislation in an area governed by Community law - Need for unequivocal wording

Summary

The principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed .

Parties

In Case 257/86

Commission of the European Communities, represented by its Legal Adviser Giuliano Marengo, acting as Agent, with an address for service in Luxembourg at the office of G . Kremlis, a member of the Commission' s Legal Department, Jean Monnet Building, Plateau de Kirchberg,

applicant,

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Diplomatic Legal Department at the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M . Braguglia, avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that by making imports of free samples of low value subject to value-added tax the Italian Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of : Lord Mackenzie Stuart, President, G . Bosco, J . C . Moitinho de Almeida and G . C . Rodríguez Iglesias (Presidents of Chambers), T . Koopmans, U . Everling, Y . Galmot, C . Kakouris and F . Schockweiler, Judges,

Advocate General : M . Darmon

Registrar : H . A . Ruehl, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 4 February 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 1 March 1988,

gives the following

Judgment

Grounds

1 By an application lodged at the Court Registry on 15 October 1986, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by making imports of free samples of low value subject to value-added tax (hereinafter referred to as VAT), although similar samples produced domestically are exempt from that tax, the Italian Republic has failed to fulfil its obligations under Article 14 (1) (a) 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) and under Article 95 of the EEC Treaty .

2 Under indent (d) of the third paragraph of Article 2 of Presidential Decree No 633 of 26 October 1972, as amended by Presidential Decree No 687 of 23 December 1974 (Giornale Ufficiale della Repubblica Italiana No 338 of 28.12.1974, p . 9071), free samples of low value expressly described as such are exempt from VAT . Article 68 provides that the provisions of the third paragraph of Article 2 are also applicable to imports .

3 That legislation was amended by Presidential Decree No 24 of 29 January 1979 (*Giornale Ufficiale della Repubblica Italiana* No 30 of 31.1.1979, p . 983), which retained the exemption provided for in the abovementioned third paragraph of Article 2 but repealed the provision of Article 68 which extended that exemption to imports . Furthermore, by resolutions of 30 June 1979 and 10 December 1982, issued in reply to certain questions, the Italian Ministry of Finance confirmed that imports of free samples of low value were subject to VAT from the date on which the Presidential Decree of 29 January 1979 came into force .

4 The Commission took the view that the different tax treatment applied on the one hand to supplies of free samples of low value within the country and on the other hand to imports of such samples constituted a breach of Article 95 of the EEC Treaty and of Article 14 (1) (a) of the Sixth Council Directive; in a letter of 3 May 1984, it asked the Italian Government to submit its observations under Article 169 of the EEC Treaty . Subsequently, it delivered a reasoned opinion which crossed with a telex from the Italian Government dated 22 May 1985 in which the Italian Government cited in its defence Article II of the Geneva Convention of 7 November 1952 (*International Convention to Facilitate the Importation of Commercial Samples and Advertising Material*) which was ratified and implemented by a law of 26 November 1957 which provides for exemption from import duties of low-value samples of all types of goods . The Italian Government maintained that under that provision it was possible to exempt from VAT free samples of low value imported from States party to the abovementioned convention, including all the Member States . It went on to state that exemption also resulted from the first paragraph of Article 72 of the Presidential Decree of 26 October 1972, as amended, which provides that all benefits provided for by treaties and international agreements concluded prior to the entry into force of the VAT system are to be maintained .

5 Furthermore, in a telex dated 8 July 1985 sent in reply to the reasoned opinion, the Italian Government indicated that pending the adoption of a consolidated law on VAT, which was expected to make the Italian legislation more consistent with Community law, the problems concerning the application of VAT to the imports in question could "provisionally be resolved de facto" by applying a resolution of the Minister of Finance of 18 June 1984 which stated that free samples of low value imported from States party to the abovementioned Geneva Convention were exempt from VAT .

6 The Commission took the view that the solution adopted by the Italian Government could not terminate the alleged infringement and thereupon delivered a second reasoned opinion supplementary to the first . It stressed that the Geneva Convention of 7 November 1952 did not enable free samples of low value imported from States which were not party to the Convention to be exempted from VAT and that, in any event, the proposed solution did not guarantee the certainty of legal relations . The Commission did not consider that the Italian Government's observations, which were sent by telex on 13 January 1986 were relevant, and it therefore brought this action .

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

8 In support of its application, the applicant submits that to exempt from VAT imports of samples of low value from countries which are party to the Geneva Convention or enjoy most favoured nation status is not sufficient to make the Italian legislation consistent with the Directive, Article 14 of which provides that imports are to be exempted if samples produced domestically are exempt from VAT .

9 As regards imports from the abovementioned countries, the applicant submits that the legal position brought about in Italy by the Presidential Decree of 29 January 1979 is one of

considerable confusion; that is also borne out by the resolutions of the Minister of Finance of 30 June 1979 and 10 December 1982 . Although the new administrative instructions amending the ministerial resolutions may have improved the situation, to maintain in force a legislative provision which discontinued the former treatment of imports in the same way as domestic transactions could create uncertainty for the persons affected, who might thus encounter difficulty in ascertaining their rights and in enforcing them before the courts .

10 In the defendant' s view, since all the Member States are parties to the Geneva Convention, imports of free samples of low value from them benefit from the exemption provided for by that convention . Consequently, it cannot be accused of any breach of Article 95 of the Treaty . As for the alleged failure to fulfil the obligations flowing from Article 14 (1) (a) of the Sixth Directive, the defendant acknowledges that there is an infringement with regard only to a very small number of States . It points out in its defence that in its note of 5 November 1986 sent to all customs divisions the Ministry of Finance not only informed them of the list of States party to the Geneva Convention but also stated that the same VAT exemption was applicable to imports from States which enjoy most favoured nation status . Since those States include the signatories to the General Agreement on Tariffs and Trade (GATT), Article 1 (1) of which provides for the extension of that status to all the states party to the agreement, the defendant considers that VAT was applied to very few imports .

11 It must be pointed out first of all that, as the Italian Government conceded, the legislation in force in Italy does not enable all imports of free samples of low value to be exempted from VAT . Although Article 72 of the Presidential Decree of 26 October 1972 must be interpreted as meaning that all exemptions provided for by international conventions or as a consequence of the application of such conventions are to be maintained, certain imports remain subject to VAT in breach of Article 14 of the directive . However, as the Court held in its judgment of 7 February 1984 in Case 166/82 Commission v Italian Republic ((1984)) ECR 459, the fact that legislation which infringes Community law is only seldom applied is not sufficient to put an end to the infringement .

12 Moreover, the Court has consistently held (see inter alia the judgment of 30 January 1985 in Case 143/83 Commission v Kingdom of Denmark ((1985)) ECR 427) that the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed .

13 The Italian legislation does not fulfil those conditions . Although, as the Italian Government submits, it exempts imports from States which are parties to the Geneva Convention or enjoy most favoured nation status, the fact remains that its ambiguity is at the root of an administrative practice incompatible with Community law . Although two resolutions of the Minister of Finance issued on 30 June 1979 and 10 December 1982 confirmed the abolition of the exemption with regard to all imports, and although a later resolution of 18 June 1984 exempted from VAT all imports of free samples of low value from States party to the Geneva Convention, the note of 5 November 1986 from the Director-General for Customs and Indirect Taxes states that such an exemption is applicable also to imports from States enjoying most favoured nation status but refers only to medical samples .

14 In its rejoinder, the Italian Republic took the view that as regards imports of samples of low value from States party to the Geneva Convention and States enjoying most favoured nation status the applicant had changed the subject-matter of the litigation by alleging an infringement on the basis of the absence of national provisions providing for the exemption from VAT of imports of such samples but of the legal uncertainty brought about by the legislation in question .

15 In this respect it should be pointed out that in the supplementary reasoned opinion and in its application the applicant had already referred to the legal uncertainty resulting from recourse simply to Article 72 of the Presidential Decree and the Geneva Convention . The reasoning in the reply is limited either to expounding more precisely the submission which had previously been made or to making it applicable also to imports from countries enjoying most favoured nation status, to which the Italian Republic had referred for the first time in its defence .

16 It must therefore be held that by adopting and maintaining in force legislation which does not grant exemption from VAT to all imports of free samples of low value and lacks clarity and precision with regard to the exemption of certain imports of such samples, while providing for exemption for similar samples produced domestically, the Italian Republic has failed to fulfil its obligations under Article 95 of the Treaty and Article 14 of Council Directive 77/388 of 17 May 1977 .

Decision on costs

Costs

17 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs . Since the Italian Republic has failed in its submissions it must be ordered to pay the costs .

Operative part

On those grounds,

THE COURT

hereby

(1) Declares that by adopting and maintaining in force legislation which does not grant exemption from value-added tax to all imports of free samples of low value and lacks clarity and precision with regard to the exemption of certain imports of such samples, while providing for exemption for similar samples produced domestically, the Italian Republic has failed to fulfil its obligations under Article 95 of the Treaty and Article 14 of Council Directive 77/388 of 17 May 1977 .

(2) Orders the Italian Republic to pay the costs .