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Judgment of the Court of 12 September 2000. - Commission of the European Communities v Kingdom of the Netherlands. - Failure to fulfil obligations - Article 4(5) of the Sixth VAT Directive - Access to roads on payment of a toll - Failure to levy VAT. - Case C-408/97.

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Summary

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Keywords

1. Actions for failure to fulfil obligations - Proof of failure - Burden on Commission - Provision of information as to national law and practice by the Member State concerned - No possibility of pleading lack of specific information

(EC Treaty, Arts 5 and 169 (now Arts 10 EC and 226 EC))

2. Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Supply of services for consideration - Definition - Provision of roads infrastructure on payment of a toll - Whether included

(Council Directive 77/388, Art. 2, para. 1)

3. Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Taxable persons - Bodies governed by public law - Activities in the exercise of public authority not taxable - Definition

(Council Directive 77/388, Art. 4(5))

Summary

1. While it is incumbent upon the Commission, in proceedings under Article 169 of the Treaty (now Article 226 EC) for failure to fulfil obligations, to prove the allegation that the obligation has not been fulfilled, a Member State cannot plead the lack of specific information as to national law and practice put forward by the Commission, and, therefore, the inadmissibility of the action, where the Commission is largely relying on the information provided by the Member State concerned, as the latter is bound to facilitate the achievement of the Commission's tasks.

(see paras 15-17)

2. The provision of roads infrastructure on payment of a toll constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes. Use of the road depends on payment of a toll, the amount of which varies inter alia according to the category of vehicle used and the distance covered. There is, therefore, a direct and necessary link between the service provided and the financial consideration received.

(see paras 29-30)

3. In order for the exemption from value added tax for bodies governed by public law, provided for by the first subparagraph of Article 4(5) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, to apply as regards activities or transactions in which they engage as public authorities, two conditions must be fulfilled: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. As regards the latter condition, activities pursued as public authorities are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders.

(see paras 34-35)

Parties

In Case C-408/97,

Commission of the European Communities, represented initially by H. Michard and B.J. Drijber, of its Legal Service, and subsequently by H. Michard and H. van Vliet, also of that service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of that service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by C. Wissels and M.A. Fierstra, Deputy Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, Bezuidenhoutseweg 67, The Hague,

defendant,

APPLICATION for a declaration that, by failing to subject to value added tax tolls collected for the use of roads as consideration for the service supplied to users, contrary to Articles 2 and 4 of the 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 (OJ 1977 L 145, p. 1), the Kingdom of the Netherlands has failed to fulfil its

obligations under the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissechot, P. Jann, H. Ragnemalm, V. Skouris and F. Macken, Judges,

Advocate General: S. Alber,

Registrar: D. Louterman-Hubeau and H.A. Rühl, Principal Administrators,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2000,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 4 December 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that by failing to subject to value added tax (hereinafter VAT) tolls collected for the use of roads as consideration for the service supplied to users, contrary to Articles 2 and 4 of the 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 (OJ 1977 L 145, p. 1, hereinafter the Sixth Directive), the Kingdom of the Netherlands had failed to fulfil its obligations under the EC Treaty.

Legal background

2 Article 2 of the Sixth Directive provides as follows:

The following shall be subject to value added tax:

- 1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;*
- 2. the importation of goods.*

3 According to Article 4(1), (2) and (5) of the Sixth Directive:

- 1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph (2), whatever the purpose or results of that activity.*
- 2. The economic activities referred to in paragraph (1) shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.*

...

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

Member States may consider activities of these bodies which are exempt under Articles 13 or 28 as activities which they engage in as public authorities.

4 It is common ground that the activity of providing access to roads and related infrastructures (hereinafter roads) on payment of a toll is not one of the activities listed in Annex D to the Sixth Directive.

Pre-litigation procedure

5 By letter of 20 April 1988 the Commission complained that the Netherlands Government was failing to comply with the Sixth Directive by not levying VAT on the tolls collected for the use of certain roads. It gave that government formal notice, pursuant to Article 169 of the Treaty, that it should submit its observations on this subject within two months.

6 Believing that the Netherlands Government had not replied to its letter of formal notice, the Commission sent it a reasoned opinion on 19 October 1989.

7 On 8 December 1989, the Netherlands Government informed the Commission that it had replied to its letter of formal notice by a letter of 5 July 1988, a copy of which it forwarded and in which it rejected the Commission's complaints.

8 Having regard to that reply and taking the view that the explanations given by the Netherlands Government were not satisfactory, the Commission sent that government a further reasoned opinion on 23 December 1996 claiming that it was failing to fulfil its obligations under the Sixth Directive. Accordingly, it called on it to take the measures necessary to fulfil those obligations within two months.

9 The Netherlands Government replied to that opinion by letter of 27 February 1997.

10 As the reply of the Netherlands Government to the reasoned opinion was not judged satisfactory, the Commission brought this action.

Admissibility

11 The Netherlands Government expresses doubts as to the admissibility of the action. It points out that it is incumbent on the Commission to prove that the obligation has not been fulfilled and to place before the Court the information necessary to enable it to determine whether that is so (see, inter alia, Case 96/81 Commission v Netherlands [1982] ECR 1791, paragraph 6).

12 In fact the Commission confines itself to stating in its application that the Kingdom of the Netherlands has failed to fulfil its obligations, without explaining in any way how the Netherlands

legislation or practice infringe the Sixth Directive or indicating what measures that Member State should have taken in order to fulfil its obligations under that directive. Similarly, during the pre-litigation procedure, the Commission did not accuse the Kingdom of the Netherlands of any specific infringement of the Sixth Directive.

13 The Netherlands Government makes clear that it has never acknowledged, either during the pre-litigation procedure or before the Court, the existence of a legislative rule or an administrative provision which breaches the obligations imposed by the Sixth Directive. The reply of the Netherlands Government to the additional reasoned opinion does state that there is now only one toll road in the Netherlands and acknowledges that VAT is not levied on the tolls collected. However, that statement, which concerned only one specific case, in no way entitles the Commission to claim generally that no VAT is charged on tolls collected as consideration for the use of roads. Moreover, that general claim by the Commission is wrong in fact, since the Westerscheldetunnel, construction of which is to be completed in 2003 and use of which is to be subject to a fee, will be subject to VAT. Accordingly, there is no general rule or policy exempting tolls collected by public bodies from VAT.

14 According to the Netherlands Government, the Commission is seeking, by its action, not a declaration of an isolated failure to fulfil obligations, but the condemnation of a general practice, which, it claims, is incompatible with the obligations imposed by the Sixth Directive.

15 According to the case-law of the Court, in proceedings under Article 169 of the Treaty for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (Case 96/81 Commission v Netherlands, cited above, paragraph 6).

16 However, it is also clear from the case-law of the Court that it is for the Member States, under Article 5 of the EC Treaty (now Article 10 EC) to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 155 of the EC Treaty (now Article 211 EC), in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied (Case 272/86 Commission v Greece [1988] ECR 4875, paragraph 30).

17 Accordingly, as the Advocate General observed at point 35 of his Opinion, a Member State cannot plead the lack of specific information as to national law and practice put forward by the Commission, and, therefore, the inadmissibility of the action, where, as here, the Commission is largely relying on the information provided by the Member State concerned.

18 Moreover, in this case the Netherlands Government does not claim that the Commission failed to give it the information necessary to prepare its defence, which would be a matter affecting the proper conduct of proceedings for failure of a State to fulfil its obligations (see, in particular, Case 274/83 Commission v Italy [1985] ECR 1077, paragraphs 19 and 20).

19 For the rest, in so far as the arguments of the Kingdom of the Netherlands dispute the alleged failure to fulfil obligations, they fall to be considered with the merits.

Substance

20 The Commission submits that providing access to roads on payment of a toll by the user is an economic activity within the meaning of Articles 2 and 4 of the Sixth Directive. That activity must be considered to be a supply of services carried out by a taxable person in the course of the exploitation of property for the purpose of obtaining income therefrom on a continuing basis, within the meaning of Article 4(1) and (2) of the Sixth Directive.

21 The fact that this activity is carried out, as it is in the Netherlands, by bodies governed by public law cannot, in its view, remove the transactions in question from the scope of the Sixth Directive.

22 In that regard, the Commission points out that under the first paragraph of Article 4(5) of the Sixth Directive it is only in respect of activities or transactions in which they engage as public authorities that bodies governed by public law are not considered to be taxable persons. The activity at issue does not come into that category, as it does not fall within the core responsibilities of public authority which can never be delegated to private bodies, bearing in mind that the rule that bodies governed by public law are not taxable persons must be interpreted strictly.

23 The Court notes, first, that by including amongst the taxable transactions defined in Article 2 not only the importation of goods but also the supply of goods or services effected for consideration within the territory of a country and by defining taxable person in Article 4(1) as any person who independently carries out an economic activity, whatever the purpose or results of that activity, the Sixth Directive attributes to VAT a very wide scope (Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 6).

24 Economic activities are defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services. In particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis is also to be considered an economic activity.

25 An analysis of those definitions shows that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (Case 235/85 Commission v Netherlands, cited above, paragraph 8).

26 In view of the scope of the term economic activities it must be held that, in providing access to roads in return for payment, operators in the Netherlands are carrying out an economic activity within the meaning of the Sixth Directive.

27 In view of the objective character of the term economic activities, the fact that the activity in question consists in the performance of duties which are conferred and regulated by law in the public interest is irrelevant. Indeed, Article 6 of the Sixth Directive expressly provides that certain activities carried on in pursuance of the law are to be subject to the system of VAT (Case 235/85 Commission v Netherlands, cited above, paragraph 10).

28 It must also be remembered that according to the case-law of the Court (in particular Case 102/86 Apple and Pear Development Council v Commissioners of Customs and Excise [1988] ECR 1443, paragraph 12, and Case C-258/95 Fillibeck v Finanzamt Neustadt [1997] ECR I-5577, paragraph 12), the concept of the supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive requires the existence of a direct link between the service provided and the consideration received.

29 As the Commission rightly submitted, providing access to roads on payment of a toll fits that definition. Use of the road depends on payment of a toll, the amount of which varies inter alia according to the category of vehicle used and the distance covered. There is, therefore, a direct and necessary link between the service provided and the financial consideration received.

30 Accordingly, providing access to roads on payment of a toll constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

31 In its letter of 5 July 1988 replying to the letter of formal notice of 20 April 1988 the Netherlands Government admitted that, in the Netherlands, the collection of motorway tolls fell within the remit of public authority and of bodies governed by public law, that two bridges and a tunnel were operated by public authority and that no VAT was charged on the tolls collected for the use of those infrastructures. It is clear from another letter from that government of 27 February 1997, replying to the reasoned opinion of 23 December 1996, that the tunnel under the Dordtse Kil was, at that time, the only roadway for the use of which a toll was payable, which went to Wegschap Tunnel Dordtse Kil, a body governed by public law, since tolls were no longer payable for the use of other roads. In the same letter, the Netherlands Government also stated that the provision of access to roads by bodies governed by public law was not considered in the Netherlands to be an activity subject to VAT.

32 It must therefore be ascertained whether the operators in question are entitled to the exemption provided for by Article 4(5) of the Sixth Directive in respect of the activity of providing access to roads on payment of a toll.

33 The first paragraph of that article provides that bodies governed by public law are not considered to be taxable persons in respect of activities or transactions in which they engage as public authorities.

34 As the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see, in particular, Case C-202/90 *Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas primera y segunda* [1991] ECR I-4247, paragraph 18).

35 As regards the latter condition, it is clear from the settled case-law of the Court of Justice (Joined Cases 231/87 and 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola and Others v Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 16; Case C-4/89 *Comune di Carpaneto Piacentino and Others v Ufficio Provinciale Imposta sul valore aggiunto di Piacenza* [1990] ECR I-1869, paragraph 8, and Case C-247/95 *Finanzamt Augsburg-Stadt v Marktgemeinde Welden* [1997] ECR I-779, paragraph 17) that activities pursued as public authorities within the meaning of the first paragraph of Article 4(5) of the Sixth Directive are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders.

36 In the light of that case-law, the Commission's argument (see paragraph 22 of this judgment) that a body acts as a public authority only in respect of activities falling within the definition of public authority in the strict sense of that term, which do not include providing access to roads on payment of a toll, must be rejected.

37 The Commission, whose legal argument has thus not been upheld by the Court, has not established, or even sought to establish, that in the present case the operators of toll roads in the Netherlands are subject to the same conditions as a private trader within the meaning of the case-

law of the Court of Justice.

38 Accordingly, it must be held that the Commission has failed to put before the Court the evidence required to substantiate the alleged failure to fulfil obligations as regards the condition relating to pursuance of an activity as a public authority.

39 However, as also noted in paragraph 34 of this judgment, the non-taxable status provided for in Article 4(5) of the Sixth Directive requires that the activities be carried out not only as a public authority but also by a body governed by public law.

40 In that regard the Court has held that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority (Case 235/85 Commission v Netherlands, cited above, paragraph 21, and Ayuntamiento de Sevilla, cited above, paragraph 19). The Court held, in paragraph 20 of the latter judgment, that it follows that if a commune entrusts the activity of collecting taxes to an independent third party the exclusion from VAT provided for by Article 4(5) of the Sixth Directive is not applicable. Similarly, the Court held in paragraph 22 of the judgment in Case 235/85 Commission v Netherlands, cited above, that even assuming that in performing their official services notaries and bailiffs in the Netherlands exercise the powers of a public authority by virtue of their appointment to public office, they cannot enjoy the exemption provided for in Article 4(5) of the Sixth Directive because they pursue those activities, not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession.

41 In the present case it is common ground that, in the Netherlands, the activity of providing access to roads on payment of a toll is, as indicated inter alia by the letters from the Netherlands Government of 5 July 1988 and 27 February 1997, carried out by bodies governed by public law.

42 Accordingly, in so far as the argument put forward by the Commission could not be upheld, the claim relating to infringement of the Sixth Directive is unfounded, and therefore the application must be dismissed.

Decision on costs

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Kingdom of the Netherlands has applied for an order for costs against the Commission and the latter has been unsuccessful, the Commission must be ordered to bear the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to bear the costs.