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Judgment of the Court of 26 February 1991. - Commission of the European Communities v Italian Republic. - VAT - Importation - Non-taxable persons - Deduction of the residual portion of the VAT paid in the Member State of exportation. - Case C-120/88.

European Court reports 1991 Page I-00621

Keywords

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Tax provisions - Domestic taxes - Discrimination - Prohibition - Levying of VAT on goods imported from another Member State by a non-taxable person - Obligation on Member States to adopt measures allowing account to be taken of the residual tax still contained in the value of the imported goods

(EEC Treaty, Art. 95)

Summary

A Member State fails to fulfil its obligations under Article 95 of the EEC Treaty if it does not adopt the measures necessary to permit persons not subject to VAT who import into its national territory goods on which VAT has already been charged in another Member State, without the possibility of obtaining a refund of that tax, to deduct from the VAT due on importation the amount of VAT paid in the Member State of exportation which is still contained in the value of the goods at the time of their importation, when the supply of similar goods by non-taxable persons within the national territory is not subject to VAT.

The full and complete application of the prohibition of discrimination laid down in Article 95 cannot be ensured solely by the fact that that provision, being directly effective, may be relied on before national courts, since that is no more than a minimum guarantee and cannot resolve the difficulties, regarding the requirements of legal certainty, created by the retention in domestic legislation of provisions which do not provide for account to be taken of the residual amount of tax.

A defence based on the absence at present of a common system applicable to the imports in question can be of no avail in denying the failure to fulfil obligations. While the establishment of such a system is a matter for the Community legislature, so long as such a system is not established, Article 95 precludes a Member State from applying its own system of VAT to imported products in a manner contrary to the principle of non-discrimination in matters of taxation.

Parties

In Case C-120/88,

Commission of the European Communities, represented by Johannes Foens Buhl and Giuliano Marenco, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission' s Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs at the Ministry for Foreign Affairs, acting as Agent, assisted by Franco Favara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty,

THE COURT

composed of: O. Due, President, G. F. Mancini, T. F. O' Higgins and G. C. Rodríguez Iglesias (Presidents of Chambers), C. N. Kakouris, R. Joliet and F. A. Schockweiler, Judges,

Advocate General: M. Darmon

Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing, as completed following the hearing on 22 February 1990,

after hearing oral argument from the parties at the hearings on 22 February and 18 September 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 6 November 1990,

gives the following

Judgment

Grounds

1 By an application lodged at the Court Registry on 19 April 1988, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not adopting the measures necessary to permit persons not subject to value added tax (VAT) who import into Italy goods on which VAT has already been charged in another Member State, without the possibility of obtaining a refund of that tax, to deduct from the VAT due on importation the amount of VAT paid in the Member State of exportation which is still contained in the value of the goods at the time of their importation, the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty.

2 The Commission claims that the failure by the Italian Republic to adopt measures allowing non-taxable persons to deduct such amounts in accordance with the established case-law of the Court creates an unclear situation at variance with the principle of legal certainty and leads to double taxation in breach of the prohibition of discriminatory taxation, a directly applicable principle laid down in Article 95 of the Treaty, as interpreted by the Court, in so far as the supply within Italy of similar goods by non-taxable persons is not subject to VAT.

3 The Italian Republic submits that the principle of the prohibition of double taxation is not sufficient in itself to resolve all the technical fiscal problems involved and that the proposal for a Sixteenth Council Directive on VAT designed to establish a common scheme for certain goods on which value added tax has been finally paid and which are imported by a final consumer in one Member State from another Member State (Official Journal 1986, C 96, p. 5) ought to be adopted without delay in order to allow for the adoption of uniform procedures and rules of application. Furthermore, the uncertainty in which Community citizens are left as regards the extent of their rights is attributable to the Community legislation and cannot be blamed on the Italian Republic.

4 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, 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.

5 It ought to be noted at the outset that, according to the established case-law of the Court, Article 95 of the Treaty lays downs a prohibition of discriminatory taxation of imported goods. That prohibition produces direct effects and creates for individuals personal rights which national courts are bound to protect (see, in particular, paragraph 46 of the judgment in Case 15/81 Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal [1982] ECR 1409 - the first Gaston Schul case).

6 According to equally well-established case-law (see the judgment in Case 47/84 Staatssecretaris van Financiën v Gaston Schul Douane-Expediteur BV [1985] ECR 1491 - Gaston Schul II - and the judgment in Case 299/86 Drexl [1988] ECR 1213), Article 95 must be interpreted as meaning that the VAT charged on the importation of goods supplied by a non-taxable person, where such tax is not charged on the supply by individuals of similar goods within the Member State of importation, must take into account the amount of VAT paid in the Member State of exportation which is still contained in the value of the goods at the time of importation, in such a way that that amount is not included in the taxable amount and is also deducted from the VAT payable on importation.

7 It follows that the relevant provisions of Community law do not, contrary to the assertions of the Italian Republic, leave Community citizens in uncertainty as to the scope of their rights with regard to the principle of equal taxation of imported goods.

8 It is not disputed that the provisions of national law in question provide for the imposition of VAT on the importation by non-taxable persons of goods on which VAT has already been paid in the Member State of exportation, without allowing the persons concerned to deduct the residual VAT from the amount of VAT payable on importation, even though the supply of similar goods by non-taxable persons within Italy is not subject to VAT.

9 Such provisions are incompatible with the prohibition of discriminatory taxation of imported goods since, despite the direct effect of Article 95, they keep non-taxable importers in a state of uncertainty as to their right to rely on that article and may induce officials of national authorities responsible for collecting VAT to refrain from applying the principle that residual VAT is to be deducted.

10 The right of non-taxable importers to rely on the directly applicable provisions of Article 95 before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see the judgment in Case 168/85 Commission v Italy [1986] ECR 2945, at paragraph 11).

11 Furthermore, the principles of legal certainty and the protection of individuals require that, in areas covered by Community law, 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 to enable national courts to ensure that those rights and obligations are observed (see the judgment in Case 257/86 Commission v Italy [1988] ECR 3249).

12 The Italian Republic' s defence submission based on the absence at present of a common system of VAT applicable to the imports in question must be rejected.

13 It is sufficient to recall in this regard that, whilst the establishment of a common system of VAT applicable to such operations is a matter for the Community legislature, so long as such a system is not established Article 95 of the Treaty precludes a Member State from applying its system of VAT to imported products in a manner contrary to the principle of non-discrimination in matters of taxation (see the judgement in Gaston Schul I, cited above).

14 The implementation of the programme of harmonization of tax legislation pursuant to Article 99 of the Treaty cannot be made into a prerequisite for the application of Article 95, which requires Member States, with immediate effect, to apply their tax legislation in a non-discriminatory manner prior to any harmonization (see the judgment in Case 171/78 Commission v Denmark [1980] ECR 447).

15 It follows that the arguments of the Italian Republic cannot be accepted.

16 In the light of all the preceding considerations, it must be held that, by not adopting the measures necessary to permit persons not subject to VAT who import into Italy goods on which VAT has already been charged in another Member State, without the possibility of obtaining a refund of that tax, to deduct from the VAT due on importation the amount of VAT paid in the Member State of exportation which is still contained in the value of the goods at the time of their importation, when the supply of similar goods by non-taxable persons within Italy is not subject to VAT, the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty.

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 not adopting the measures necessary to permit persons not subject to VAT who import into Italy goods on which VAT has already been charged in another Member State, without the possibility of obtaining a refund of that tax, to deduct from the VAT due on importation the amount of VAT paid in the Member State of exportation which is still contained in the value of the goods at the time of their importation, when the supply of similar goods by non-taxable persons within Italy is not subject to VAT, the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty;

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