61989J0159

Judgment of the Court of 26 February 1991. - Commission of the European Communities v Hellenic Republic. - VAT - Importation - Non-taxable persons - Deduction of the residual portion of the VAT paid in the Member State of exportation. - Case C-159/89.

European Court reports 1991 Page I-00691

Keywords

++++

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.

Defence submissions based on the absence at present of a common system applicable to the imports in question and on arguments relating to the nature of VAT and the apportionment of tax revenue between Member States can be of no avail in denying the failure to fulfil obligations. In the first place, the deduction in the Member State of importation of the amount of VAT paid in the Member State of exportation and still contained in the value of the goods at the time of their importation does not call in question the inherent nature of VAT as a tax on consumption, in so far as such a description is independent of the apportionment of the tax charge between the Member State of exportation and that of importation. Secondly, whilst the establishment of a common system of VAT entailing complete neutrality in the field of competition, the full remission in the State of exportation of VAT in respect of the goods in question, as well as the fair and equitable apportionment of tax revenue between Member States are all matters for the Community legislature, so long as such a system is not established, Article 95 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.

Parties

In Case C-159/89,

Commission of the European Communities, represented by Dimitrios Gouloussis, Legal Adviser, Maria Condou Durande and Daniel Calleja, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission' s Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Katerina Samoni, Advocate, Special Senior Legal Assistant at the European Communities Department of the Ministry of Foreign Affairs, and Panagiotis Mylonopoulos, Advocate, Special Deputy Legal Assistant at the European Communities Department of the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

supported by

Kingdom of Spain, represented by Javier Conde de Saro, Director-General for Coordination in Matters involving Community Law and Institutions, and by António Hierro Hernández-Mora, Abogado del Estado, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4 and 6 boulevard Emmanuel Servais,

intervener,

APPLICATION for a declaration that the Hellenic 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, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: M. Darmon

Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing,

after hearing the submissions of the parties at the hearing on 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 3 May 1989, the Commission of the European Communities brought an action before the Court 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 Greece 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 Hellenic Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty.

2 The Commission claims that the failure by the Hellenic 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 Greece of similar goods by non-taxable persons is not subject to VAT. Neither the direct effect of Article 95 nor the existence of the proposal for a Sixteenth Council Directive on 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) releases the Hellenic Republic from its obligation to amend its national law to meet the requirements of the Treaty.

3 Although it is not opposed in principle to the elimination of double taxation of imported goods, the Hellenic Republic believes that this is a matter which requires clear and precise rules in the form of a Community directive; this, it believes, is the only solution which will enable the relevant principles to be applied uniformly.

4 The Kingdom of Spain, which has intervened in support of the conclusions of the Hellenic Republic, submits that a right to a deduction in the Member State of importation, which is proposed by the Commission, is at odds with the inherent nature of VAT as a tax on consumption and with a

fair and equitable apportionment of tax revenue between the Member State of exportation and that of importation. Goods ought rather to benefit from a remission of tax on exportation and be taxed on importation according to their value at the time when they cross the border.

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

6 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).

7 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 - the second Gaston Schul case - 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.

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 Greece 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 Hellenic 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, as must the arguments put forward by the Kingdom of Spain based on the nature of VAT and the apportionment of tax revenue between Member States.

13 In the first place, the deduction in the Member State of importation of the amount of VAT paid in the Member State of exportation and still contained in the value of the goods at the time of their

importation does not call in question the inherent nature of VAT as a tax on consumption, in so far as such a description is independent of the apportionment of the tax charge between the Member State of exportation and that of importation.

14 Secondly, whilst the establishment of a common system of VAT entailing complete neutrality in the field of competition, the full remission in the State of exportation of VAT in respect of the goods in question as well as the fair and equitable apportionment of tax revenue between Member States are all matters 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 judgment in the first Gaston Schul case, cited above).

15 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).

16 It follows that the arguments of the Hellenic Republic and the Kingdom of Spain cannot be accepted.

17 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 Greece 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 Greece is not subject to VAT, the Hellenic Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty.

Decision on costs

Costs

18 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic and the Kingdom of Spain, which intervened on its behalf, have failed in their submissions, they 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 Greece 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 Greece is not subject to VAT, the Hellenic Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty;

(2) Orders the Hellenic Republic and the Kingdom of Spain to pay the costs.