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Judgment of the Court of 17 October 1991. - Commission of the European Communities v Kingdom of Spain. - VAT - Directive 77/388/EEC - National law not complying therewith. - Case C-35/90.

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Keywords

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Tax provisions - Harmonization of laws - Turnover tax - Common system of value added tax - Right of Member States to maintain certain exemptions during a transitional period - Scope - Introduction of new exemptions - Not permissible

(Council Directive 77/388, Art. 2(1) and 28(3)(b))

Summary

A Member State which, in implementation of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes has subjected, as provided for in Article 2(1) of the Directive, professional services, including those the consideration for which consist of copyright, provided by figurative artists, writers, literary contributors in newspapers and magazines, newspaper and magazine illustrators and photographers, composers of music, playwrights and persons responsible for the plot, adaptation, script or dialogue of audio-visual works, is no longer entitled subsequently to grant exemption for those activities in reliance on the right granted by Article 28(3)(b) of the directive to continue to exempt, during the transitional period, services supplied by authors, artists and performers.

Parties

In Case C-35/90,

Commission of the European Communities, represented by Daniel Calleja y Crespo, a member of its Legal Service acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented by Carlos Bastarache Saguees, Director-General of Community Legal and Institutional Coordination, and Antonio Hierro Hernández-Mora, Abogado del Estado, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

defendant,

APPLICATION for a declaration that, by exempting from value added tax professional services, including those the consideration for which consists of copyright, provided by figurative artists, writers, literary contributors to newspapers and magazines, newspaper and magazine illustrators and photographers, composers of music, playwrights and persons responsible for the plot, adaptation, script or dialogue of audio-visual works, contrary to Article 2(1) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover tax - Common system of value added tax: uniform basis of assessment (Official Journal 1977 L 145, p. 1), the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. Grévisse and P.J.G. Kapteyn (Presidents of Chambers), C.N. Kakouris, J.C. Moitinho de Almeida, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument presented by the parties at the sitting on 25 April 1991, during which the Kingdom of Spain was represented by G. Calvo Díaz and Rosario Silva de Lapuerta, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 May 1991,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 2 February 1990, the Commission of the European Communities brought, under Article 169 of the EEC Treaty, an action for a declaration that, by exempting from value added tax professional services, including those the consideration

for which consists of copyright, provided by figurative artists, writers, literary contributors to newspapers and magazines, newspaper and magazine illustrators and photographers, composers of music, playwrights and persons responsible for the plot, adaptation, script or dialogue of audio-visual works, contrary to Article 2(1) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of laws of the Member States relating to turnover tax - Common system of value added tax: uniform basis of assessment (Official Journal 1977 L 145, p. 1), the Kingdom of Spain had failed to fulfil its obligations under the EEC Treaty.

2 The aforementioned professional services were subject to the general system of value added tax (hereinafter referred to as "VAT") pursuant to the provisions of the Sixth Directive and the Act of Accession of the Kingdom of Spain to the European Communities by Law No 30 of 2 August 1985 on VAT (Boletín Oficial del Estado Español of 9 August 1985). That liability was confirmed by Royal Decree No 2028 of 30 October 1985 approving the regulation on VAT (Boletín Oficial del Estado Español of 31 October 1985). Subsequently, the third supplementary provision of Law No 22 of 11 November 1987 on intellectual property (Boletín Oficial del Estado Español of 17 November 1987) exempted those services from VAT.

3 The Commission considers that that exemption is contrary to Article 2(1) of the Sixth Directive which subjects to VAT "the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such". It considers first of all that only the Member States who were already charging VAT in accordance with the earlier Community directives when the Sixth Directive entered into force had the right to continue to grant exemption for a transitional period to certain services including those in question in accordance with Article 28(3)(b) of the Sixth Directive. As regards Member States who subsequently joined the Community only authorization similar to that obtained by the Portuguese Republic in the Act of Accession would have allowed the Kingdom of Spain to apply the aforementioned provision.

4 The Commission adds that even if that interpretation of Article 28(3)(b) is not accepted and if that provision were interpreted as allowing a new Member State to continue to exempt the activities in question in the case where such exemption existed in relation to a tax, such as that in force in Spain before accession (cumulative multi-stage tax on the volume of transactions), the exemption in question would be unlawful because the Kingdom of Spain cannot be authorized to restore exemption from VAT for the services on which, since its accession, it has charged VAT.

5 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.

6 The Spanish Government considers that Article 28(3)(b) of the Sixth Directive authorizes the exemption in question. Article 28(3) reads: "during the transitional period referred to in paragraph 4, Member States may: ... (b) continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned", and Annex F includes at Point 2 "services supplied by authors, artists, performers". At the time the Sixth Directive was adopted as well as immediately before accession of the Kingdom of Spain to the European Communities the provision of services in question was exempt in Spain from the tax which VAT superseded.

7 Since the Kingdom of Spain subjected the provision of the services in question to the general scheme of VAT by Law No 30/1985 which entered into force on 1 January 1986 it could no longer subsequently claim the right to continue to exempt those activities pursuant to Article 28(3)(b) of the Sixth Directive.

8 The Spanish Government contended in addition that the extension of the transitional scheme on exemptions beyond the period provided for in Article 28(4) allows Article 28(4)(3)(b) to be interpreted as meaning that Member States may reintroduce into their law the exemption of the activities in question, in particular where it is necessary to ensure equality of treatment for authors

residing in their territory in relation to authors residing in the territory of other Member States who continue to grant such exemption.

9 Although in interpreting a provision of Community law it is necessary to take account of how the law stands at the date when the provision in question must be applied (see, inter alia, Opinion 1/78 of 4 October 1979, point 44, [1979] ECR 2871), the extension of the transitional scheme of exemptions from VAT beyond the period originally provided for cannot justify the right of Member States to grant exemptions which they were not authorized to grant. Such a right would compromise the object of Article 28(3)(b) which is to enable a progressive adjustment of the national laws in the areas in question.

10 In consequence it must be observed that, by exempting from value added tax professional services, including those the consideration for which consists of copyright, provided by figurative artists, writers, literary contributors to newspapers and magazines, newspaper and magazine illustrators and photographers, composers of music, playwrights and persons responsible for the plot, adaptation, script or dialogue of audio-visual works, contrary to Article 2(1) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover tax - Common system of value added tax: uniform basis of assessment, the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty.

Decision on costs

Costs

11 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Declares that, by exempting from value added tax professional services, including those the consideration for which consists of copyright, provided by figurative artists, writers, literary contributors to newspapers and magazines, newspaper and magazine illustrators and photographers, composers of music, playwrights and persons responsible for the plot, adaptation, script or dialogue of audio-visual works, contrary to Article 2(1) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover tax - Common system of value added tax: uniform basis of assessment, the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty;

2. Orders the Kingdom of Spain to pay the costs.