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Judgment of the Court of 1 December 1993. - Commission of the European Communities v Kingdom of Denmark. - Article 33 of the Sixth VAT Directive - Turnover tax - Law relating to the labour market contribution. - Case C-234/91.

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Keywords

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1. Actions against Member States for failure to fulfil obligations ° Scope of the proceedings ° Determination during the pre-litigation procedure ° Subsequent enlargement ° Not permissible

(EEC Treaty, Art. 169)

2. Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Prohibition on charging other national taxes in the nature of turnover taxes ° Labour market contribution introduced in Denmark ° Not permissible

(Council Directive 77/388, Art. 33)

Summary

1. The scope of an action brought under Article 169 of the Treaty is circumscribed both by the preliminary administrative procedure provided for by that article and by the form of order sought in the application. The Commission' s reasoned opinion and its application must be founded on the same grounds and pleas. In so far as a complaint was not raised in the pre-litigation procedure, it is not admissible.

2. A Member State, in this case Denmark, infringes Article 33 of the Sixth Directive (77/388), which prohibits the Member States from levying taxes, duties or charges in the nature of turnover taxes, and thereby fails to fulfil its obligations under the Treaty, in particular Article 189, if it introduces and maintains fiscal rules providing for the payment of a labour market contribution, which is a levy of a fiscal nature generally charged on the same basis of assessment as value added tax, but

without complying with the Community rules applying to value added tax, in so far as the said contribution:

° is paid both on activities subject to value added tax and on other industrial or commercial activities which consist in the supply of services for consideration;

° is charged, in the case of undertakings which are taxable persons for value added tax purposes, on the same basis of assessment as that used for value added tax, in other words as a percentage of the volume of sales after deduction of purchases;

° unlike value added tax, is not paid on importation, but is charged on the full sale price of imported goods at the first sale in the Member State concerned;

° unlike value added tax, does not have to be indicated separately on invoices; and

° is charged alongside value added tax.

Parties

In Case C-234/91,

Commission of the European Communities, represented by Johannes Foens Buhl, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Nicola Annecchino, a member of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Denmark, represented by Joergen Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Royal Danish Embassy, 4 Boulevard Royal,

defendant,

APPLICATION for a declaration, under the second paragraph of Article 169 of the EEC Treaty, that, by introducing and maintaining, by means of Law No 840 of 18 December 1987, as amended, the fiscal rules providing for the payment of a labour market contribution, which is a levy of a fiscal nature generally charged on the same basis of assessment as value added tax, but without complying with the Community rules applying to value added tax, the Kingdom of Denmark has infringed Article 33 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 (OJ 1977 L 145, p. 1), and has therefore failed to fulfil its obligations under the EEC Treaty, in particular Article 189 thereof,

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida (Presidents of Chambers), R. Joliet, F.A. Schockweiler, G.C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg and J.L. Murray, Judges,

Advocate General: G. Tesauro,

Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 July 1993, at which the Danish Government was represented by Joeogen Molde and Gregers Larsen, of the Copenhagen Bar,

after hearing the Opinion of the Advocate General at the sitting on 28 September 1993,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 17 September 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by introducing and maintaining, by means of Law No 840 of 18 December 1987, as amended, the fiscal rules providing for the payment of a labour market contribution, which is a levy of a fiscal nature generally charged on the basis of the same assessment basis as value added tax (hereinafter "VAT"), but without complying with the Community rules applying to VAT, the Kingdom of Denmark had infringed Article 33 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 (OJ 1977 L 145, p. 1, hereinafter "the Sixth Directive"), and consequently failed to fulfil its obligations under the EEC Treaty, in particular Article 189 thereof.

2 As part of the economic policy conducted by the Danish Government with a view to relaunching the economy, Law No 840 of 18 December 1987 (Lov om arbejdsmarkedsbidrag, hereinafter "Law No 840"), which entered into force on 1 January 1988, imposed on undertakings a levy, the labour market contribution (hereinafter "the AMBI", to use the acronym habitually used in Denmark), which was intended to enable the public authorities to finance certain social expenditure previously borne by employers.

3 The basis for calculating that levy, the rate of which was 2.5%, was determined differently depending on whether the undertaking was subject to VAT or completely or partially exempt from VAT. In the case of undertakings fully subject to VAT, the AMBI was calculated on the same basis as that used to assess VAT, namely on the basis of turnover (the so-called "VAT calculation method"). In the case of other undertakings, Law No 840 prescribed that calculation method in some cases and in others a second method which consisted in calculating the AMBI on the basis of the aggregate wages and salaries paid by the undertaking, plus 90% (the so-called "aggregate-wages calculation method").

4 Both private individuals and the Commission contested the compatibility with Community law of the AMBI when calculated according to the VAT method.

5 The Danish companies Dansk Denkavit and P. Poulsen Trading asked the customs administration to repay the contributions which they paid in 1988 and 1989. In support of their claim, they argued that the Danish law was incompatible with Article 33 of the Sixth Directive and with Article 9 et seq. and Article 95 of the EEC Treaty. That action was brought in the OEstre Landsret (Eastern Regional Court), which, by order of 20 June 1990, referred four questions to the Court for a preliminary ruling.

6 In the judgment of 31 March 1992 in Case C-200/90 Dansk Denkavit [1992] ECR I-2217 the Court ruled in answer to those questions that Article 33 of the Sixth Directive precludes the introduction or maintenance of a fiscal levy which:

° is paid both on activities subject to VAT and on other industrial or commercial activities which consist in the supply of services for consideration;

° is charged, in the case of undertakings which are taxable persons for VAT purposes, on the same basis of assessment as that used for VAT, in other words as a percentage of the volume of sales after deduction of purchases;

° unlike VAT, is not paid on importation, but is charged on the full sale price of imported goods at the first sale in the Member State concerned;

° unlike VAT, does not have to be indicated separately on invoices; and

° is charged alongside VAT.

7 For its part, the Commission, by letter before action dated 22 May 1989, informed the Danish Government that it considered that the AMBI was a turnover tax within the meaning of the Sixth Directive and that it was therefore contrary to Article 33 of the Sixth Directive, which prohibits the Member States from levying domestic taxes in the nature of turnover taxes.

8 After the Danish Government informed it that it rejected those objections, the Commission delivered a reasoned opinion under Article 169 of the Treaty on 27 September 1990 in which it asked it to take the necessary measures to bring its legislation into line with Community law within one month of notification of the reasoned opinion.

9 By letter dated 6 December 1990, the Danish Government confirmed that in its view the Commission' s objections were unfounded. It maintained that the AMBI was not a turnover tax covered by the prohibition set out in Article 33 of the Sixth Directive. Accordingly, the Law introducing that levy complied in full with the principles of the Sixth Directive and did not impede the proper application thereof.

10 By application dated 12 September 1991 the Commission brought an action in the Court of Justice for a declaration that the Kingdom of Denmark had failed to fulfil its obligations under Community law.

11 On 21 December 1991 the Danish legislature adopted Law No 891 repealing the Law on the Labour Market Contribution and amending the Law on Value Added Tax (Lov om ophaevelse af lov om arbejdsmarkedsbidrag og om aendring af mervaerdiafgiftsloven (momsloven) m.v., hereinafter "Law No 891") with effect from 1 January 1992. That Law completely repealed the provisions of Law No 840 which imposed the AMBI on Danish undertakings. In addition, it amended the rates of VAT in force in Denmark.

12 Despite the judgment of 31 March 1992 giving a preliminary ruling, cited above, and the adoption of Law No 891 abolishing the levy at issue, the Commission considered it appropriate to maintain its application.

13 In the light of the Commission' s reply, the application is to be construed as embodying two complaints.

14 The first relates to the contribution calculated according to the aggregate-wages method. In this connection, the Commission argues that the action for failure to fulfil obligations continues to be relevant since it is not certain that Law No 891 abolished the AMBI where it is determined on the basis of aggregate wages and salaries.

15 It is appropriate to hold in this respect, as the Danish Government argues in its rejoinder and as the Commission itself has acknowledged, that that complaint was raised in the reply and not during the pre-litigation procedure, which concentrated exclusively on the contribution calculated according to the VAT method.

16 As the Court has consistently held, illustrated in particular by the judgment in Case 166/82 Commission v Italy [1984] ECR 459, paragraph 16, the scope of an action brought under Article 169 of the Treaty is delimited both by the preliminary administrative procedure provided for by that article and by the form of order sought in the application, and that the Commission' s reasoned opinion and its application must be founded on the same grounds and pleas.

17 Consequently, in so far as it is directed against the levy calculated on the basis of aggregate wages and salaries, the application is inadmissible.

18 The Commission' s second complaint concerns the contribution calculated according to the VAT method.

19 In its defence of 4 May 1992, the Danish Government does not contest the claim that the Kingdom of Denmark infringed Community law by introducing a labour market contribution calculated according to the VAT method. However, it argued that the application for failure to fulfil obligations had lost its relevance on account of the adoption of Law No 891 and the ruling of 31 March 1992, cited above.

20 For its part, the Commission objects that Law No 891, which abolished the levy, did not enter into force until 1 January 1992, that is to say after the expiry of the period of one month set in the reasoned opinion.

21 It has to be held in that respect that, even though the Court' s preliminary ruling showed that the Danish law was incompatible with Community law, since the levy at issue was not abolished until after the expiry of the period indicated in the reasoned opinion, it is for the Commission alone to assess whether it is expedient to pursue its application for a declaration that the Member State in question has failed to fulfil its obligations.

22 It follows from all the foregoing considerations that, by introducing and maintaining by Law No 840 of 18 December 1987, as amended, the fiscal rules providing for the payment of a contribution to support the labour market, which is a levy of a fiscal nature generally charged on the same basis of assessment as value added tax, but without complying with the Community rules applying to value added tax, the Kingdom of Denmark has infringed the provisions of Article 33 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, and has consequently failed to fulfil its obligations under the EEC Treaty, in particular Article 189 thereof.

Decision on costs

Costs

23 Under the first subparagraph of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order that the costs may be shared or that the parties bear their own costs.

24 Since both parties were unsuccessful in respect of some of their pleas, it is appropriate to order each party to bear its own costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Declares that, by introducing and maintaining by Law No 840 of 18 December 1987, as amended, the fiscal rules providing for the payment of a contribution to support the labour market, which is a levy of a fiscal nature generally charged on the same basis of assessment as value added tax, but without complying with the Community rules applying to value added tax, the Kingdom of Denmark has infringed the provisions of Article 33 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, and has consequently failed to fulfil its obligations under the EEC Treaty, in particular Article 189 thereof;

2. Orders each of the parties to bear its own costs.