61992J0068

Judgment of the Court of 17 November 1993. - Commission of the European Communities v French Republic. - Value added tax - Sixth directive - Advertising services. - Case C-68/92.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Supply of services ° Determination of place of taxation ° "Advertising services" within the meaning of the Sixth Directive ° Definition ° Promotional activities

(Council Directive 77/388, Art. 9(2)(e))

Summary

The concept of "advertising services" within the meaning of Article 9(2)(e) of the Sixth Directive, relating to the place of taxation for certain supplies of services, is a Community concept which must be interpreted uniformly in order to avoid instances of double taxation or non-taxation which may result from conflicting interpretations.

That concept covers a promotional activity, such as the sale of goods at reduced prices, the handing-out to consumers of movable tangible property sold to the recipient by an advertising agency, the supply of services at reduced prices or free of charge, or the organization of a cocktail party or banquet, if that activity involves conveying a message intended to inform the public of the existence and the qualities of the product or service which is the subject-matter of the activity, with a view to increasing the sales of that product or service. The same applies to any activity which forms an inseparable part of an advertising campaign and which thereby contributes to conveying the advertising message, which is the case with regard to the production of aids used for a particular advertisement.

Parties

In Case C-68/92,

Commission of the European Communities, represented by Thomas F. Cusack, Legal Adviser, and Edith Buissart, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Centre Wagner, Kirchberg,

applicant,

v

French Republic, represented by Philippe Pouzoulet, Deputy Director of the Directorate for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, and Jean-Louis Falconi, Secretary for Foreign Affairs, acting as deputy Agent, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

defendant,

APPLICATION for a declaration that, by excluding a series of economic transactions from the concept of "advertising services" under Article 9(2)(e) of 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), the French Republic has failed to fulfil its obligations under that directive,

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C.N. Kakouris, F.A. Schockweiler, F. Grévisse, M. Zuleeg and P.J.G. Kapteyn, Judges,

Advocate General: C. Gulmann,

Registrar: D. Loutermann-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 May 1993,

after hearing the Opinion of the Advocate General at the sitting on 13 July 1993,

gives the following

Judgment

Grounds

1 By application received by the Court Registry on 6 March 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by excluding a series of economic transactions from the concept of "advertising services" under Article 9(2)(e) of 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"), the French

Republic has failed to fulfil its obligations under that directive.

2 The seventh recital in the preamble to the Sixth Directive, dealing with the problem of the place of taxable transactions, which had given rise to conflicts of jurisdiction between Member States, in particular as regards supplies of goods for assembly and the supply of services, states as follows:

"... although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods."

3 In pursuit of the objective indicated by that recital, Article 9(1) of the Sixth Directive provides that:

"the place where a service is supplied shall be deemed to be the place where the supplier has established his business... ."

4 Article 9(2) sets out a number of exceptions to that principle. With regard to advertising services, it provides as follows:

"However:

...

(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

° advertising services."

5 This last-mentioned provision was incorporated into French law by Article 259-B of the General Taxation Code ("the Code").

6 The term "advertising services" in Article 259-B was defined, for the needs of the tax authorities and taxpayers, by Administrative Instruction No. 3 A-28-83 of 14 December 1983. That instruction sets out, by means of a non-exhaustive list, a number of transactions which, according to the French authorities, constitute "advertising services".

7 However, the instruction states that the following cannot be considered as advertising services within the meaning of Article 259-B:

(a) the sale of tangible movable property by an advertising undertaking to its customer, for example, the sale of goods intended to be given away free in connection with games, lotteries, gifts, competitions ... or to be installed in sales premises for the display of products;

(b) services which may be supplied by an advertising undertaking in connection with various events such as recreational functions, cocktail parties, etc.;

(c) the production, in the strict sense, of aids for advertising, for example, the printing of advertising material by a printer, or the construction of an advertisement hoarding.

8 The transactions under (a) are subject to VAT in the State designated by the provisions of the Code governing the supply of tangible movable property. Those covered by (b) and (c) above are

subject to VAT, in accordance with the provisions of the Code applicable in those cases, either in the supplier' s country or in the country where they are physically carried out.

9 The Commission took the view that the distinction laid down by the French administrative instruction with regard to advertising services was contrary to Article 9(2)(e) of the Sixth Directive because the effect of that distinction was that transactions not classified as advertising services were not taxed in the customer' s country, as required by that provision. It therefore initiated against the French Republic the procedure provided for by Article 169 of the EEC Treaty.

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 At the hearing the Commission explained that its action was directed solely against the non-classification by the French authorities of the transactions listed under (a), (b) and (c) of the administrative instruction, set out in paragraph 7 above, as advertising services.

12 The French Government contends that that exclusion is not contrary to Article 9(2)(e) of the Sixth Directive. It is explained by the fact that promotional activities, including the supply of goods, differ in nature from advertising services, even if those activities form part of an advertising campaign. The distinction thus made between advertising in the strict sense and promotion is in conformity with the letter and the spirit of the Sixth Directive, which, for the purpose of determining the regime applicable to each type of transaction, looks to the nature of the taxable transaction (supply of goods ° supply of services) and not to the purpose which the customer has in mind.

13 It is therefore necessary to consider whether promotional activities constitute advertising services within the meaning of Article 9(2)(e) of the Sixth Directive.

14 That article constitutes a rule of conflict which determines the place of taxation of advertising services and, consequently, delimits the powers of the Member States. It follows that "advertising services" is a Community concept which must be interpreted uniformly in order to avoid instances of double taxation or non-taxation which may result from conflicting interpretations.

15 As may be seen from the seventh recital in the preamble to the Sixth Directive, defining the place of taxation of advertising services as the place where the person to whom the services are supplied has his principal place of business is justified by the fact that the cost of those services, supplied between taxable persons, is included in the price of the goods. The Community legislature therefore considered that, in so far as the person to whom the services are supplied customarily sells the goods or supplies the services advertised in the State where he has his principal place of business, and charges the corresponding VAT to the final consumer, the VAT based on the advertising service should itself be paid by that person to that State. This reasoning is one of the factors which must be taken into account in interpreting the term "advertising services" in Article 9(2)(e) of the Sixth Directive.

16 The concept of advertising necessarily entails the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales. Although that message is usually spread, by means of spoken or printed words and/or pictures, by the press, radio and/or television, this can also be done by the partial or exclusive use of other means.

17 In order to determine, where other means are used exclusively, whether the transaction concerned is an advertising service within the meaning of Article 9(2)(e) of the Sixth Directive, it is necessary in each case to take account of all the circumstances surrounding the service in question. One such circumstance, enabling a service to be characterized as "advertising", exists where the means used have been procured by an advertising agency. However, for a service to be

so characterized, it is not an essential condition that the supplier be an advertising agency. It is always possible that an advertising service may be supplied by an undertaking which is not exclusively, or even mainly, engaged in advertising, although this is an unlikely eventuality.

18 It is therefore sufficient that a promotional activity, such as the sale of goods at reduced prices, the handing-out to consumers of goods sold to the person distributing them by an advertising agency, the supply of services at reduced prices or free of charge, or the organization of a cocktail party or banquet, involves the dissemination of a message intended to inform the public of the existence and the qualities of the product or service which is the subject-matter of the activity, with a view to increasing the sales of that product or service, for the activity to be characterized as an advertising service within the meaning of Article 9(2)(e) of the Sixth Directive.

19 The same applies to any activity which forms an inseparable part of an advertising campaign and which thereby contributes to conveying the advertising message. This is the case with regard to the production of aids used for a particular advertisement.

20 It follows that, by excluding, by means of an administrative practice, from the definition of "advertising service" within the meaning of Article 9(2)(e) of the Sixth Directive (a) the sale by an advertising agency to its customer of articles intended to be handed out to consumers, (b) services provided by an advertising agency in connection with various events such as recreational functions, cocktail parties ..., and (c) the production of advertising aids, even where all those activities either involve conveying an advertising message or are inextricably linked to the conveying of such a message, the French Republic has failed to fulfil its obligations under the Sixth Directive.

Decision on costs

Costs

21 Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the French Republic has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Declares that, by excluding, by means of an administrative practice, from the definition of "advertising service" within the meaning of Article 9(2)(e) of 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, (a) the sale by an advertising agency to its customer of articles intended to be handed out to consumers, (b) services provided by an advertising agency in connection with various events such as recreational functions ..., and (c) the production of advertising aids, even where all those activities either involve conveying an advertising message or are inextricably linked to the conveying of such a message, the French Republic has failed to fulfil its obligations under the Sixth Directive;

2. Orders the French Republic to pay the costs.