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Judgment of the Court of 17 November 1993. - Commission of the European Communities v Grand Duchy of Luxembourg. - Value added tax - Sixth directive - Advertising services. - Case C-69/92.

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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 ° Transaction effected in the context of an advertising campaign or a public-relations event

(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 transaction such as the sale by the supplier to the recipient, in the context of an advertising campaign, of movable tangible property distributed free to consumers or sold to them at a reduced price, or the organization of a cocktail party, a press conference, a seminar, a recreational function or other forms of public relations, if such an event involves conveying a message intended to inform the public of the existence and the qualities of a 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 the conveying of the advertising message, as in the case of the sale by the supplier to the recipient, in the context of an advertising campaign, of

movable tangible property or services provided in the course of various public-relations events, even if those goods and services, considered in isolation, do not involve conveying an advertising message.

Parties

In Case C-69/92,

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, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Grand Duchy of Luxembourg,

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 Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive and under the EEC Treaty,

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. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the Commission 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 lodged at 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 (in particular, press conferences, seminars, cocktail parties, recreational functions and the letting of sites for advertising) 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 Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive and under the EEC Treaty.

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 in Article 17(2)(e) of the Luxembourg VAT Law of 12 February 1979 (Luxembourg Official Gazette, Part A, No 23, p. 453). The Grand-Ducal Regulation of 7 March 1980 laying down the limits and conditions for the application of the reduced rate of VAT (Luxembourg Official Gazette, Part A, No 16, p. 238) is intended to define the various transactions that are taxable at the reduced rate. Article 4(e) defines advertising services as "any advertising generally whatever and, in particular, advertising in newspapers, periodicals, books, brochures, concert programmes, theatre programmes and programmes for other events, by ordinary posters or illuminated signs, by film or slide projection, by television or radio broadcasting ...".

6 According to the documents before the Court, the Luxembourg authorities stated by letter of 6 December 1988, in reply to a request by the Commission for information, that according to their own interpretation Article 4(e) of the Grand-Ducal Regulation did not apply to:

(a) the sale of movable tangible property in the context of an advertising campaign; the place of taxation of such a transaction was that laid down by Article 8 of the Sixth Directive;

(b) services provided in the context of public-relations events such as press conferences, seminars, cocktail parties, recreational functions ... ; these services were taxable in the country in

which they were physically carried out;

(c) the letting of sites for advertising, since this transaction did not constitute an advertising service.

7 Since it took the view that the distinction between advertising services drawn by the Grand-Ducal Regulation, as applied by the Luxembourg authorities, was contrary to Article 9(2)(e) of the Sixth Directive, the Commission, on 20 October 1989, initiated the procedure laid down in Article 169 of the EEC Treaty by giving the Grand Duchy of Luxembourg formal notice to submit its observations.

8 In its reply of 12 February 1990, the Government of the Grand Duchy stated that:

(a) the restrictive interpretation adopted by the national authorities was compatible with Community law since it was based on the Court's own case-law (judgment in Case 139/84 Van Dijk' s Boekhuis v Staatssecretaris van Financiën [1985] ECR 1405);

(b) this interpretation was corroborated by a report issued by the Commission to the VAT Committee;

(c) the exclusion of the supply of goods, within the context of an advertising campaign, could be explained by the fact that the administrative interpretation related to the concept of "advertising services".

9 As it was unable to accept the arguments put forward by the Luxembourg Government, the Commission sent it, on 6 September 1991, a reasoned opinion, which remained unanswered. The Commission then brought the present action.

10 The Grand Duchy of Luxembourg, on which the application initiating proceedings was duly served, failed to lodge a defence within the period allowed to it. Relying on Article 94(1) of the Rules of Procedure, the Commission applied to the Court for judgment by default.

11 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.

12 In this case, the Court is giving judgment by default. In accordance with Article 94(2) of the Rules of Procedure, it must therefore consider whether the application initiating proceedings is admissible and whether the application appears well founded.

13 With regard to admissibility, the Court has consistently held (see the judgment in Case C-210/91 Commission v Greece [1992] ECR I-6735, paragraph 10) that an application brought under Article 169 of the EEC Treaty can be based only on the grounds and submissions already set forth in the reasoned opinion. In the present case, the head of complaint relating to the letting of sites for purposes of advertising was not included in the reasoned opinion and must for that reason be declared inadmissible.

14 With regard to the heads of complaint relating to the sale of movable tangible property in the context of an advertising campaign and to services provided in the context of various public-relations events (press conferences, seminars, cocktail parties, recreational functions, and so on), it is necessary to consider whether the transactions in question constitute advertising services within the meaning of Article 9(2)(e) of the Sixth Directive.

15 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.

16 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.

17 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.

18 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.

19 It is therefore sufficient that a transaction, such as the sale by the supplier to the recipient, in the context of an advertising campaign, of movable tangible property distributed free to consumers or sold to them at a reduced price, or the organization of a cocktail party, a press conference, a seminar, a recreational function or other forms of public relations, should involve the conveying of a message intended to inform the public of the existence and the qualities of a 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.

20 The same applies to any activity which forms an inseparable part of an advertising campaign and which thereby contributes to the conveying of the advertising message. This is the case with regard to the sale by the supplier to the recipient, in the context of an advertising campaign, of movable tangible property or services provided in the course of various public-relations events, even if those goods and services, considered in isolation, do not involve conveying an advertising message.

21 It follows that, by excluding the sale of movable tangible property in the context of an advertising campaign and services provided in connection with a variety of public-relations events, such as press conferences, seminars, cocktail parties and recreational functions, from the concept of "advertising services" under Article 9(2)(e) of the Sixth Directive, even where those transactions either involve conveying an advertising message or are inextricably linked to the conveying of such a message, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive and under the EEC Treaty.

Decision on costs

Costs

22 Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the Grand Duchy of Luxembourg has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

- 1. Declares that, by excluding the sale of movable tangible property in the context of an advertising campaign and services provided in connection with a variety of public-relations events, such as press conferences, seminars, cocktail parties and recreational functions, 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, even where those transactions either involve conveying an advertising message or are inextricably linked to the conveying of such a message, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive and under the EEC Treaty;*
- 2. Orders the Grand Duchy of Luxembourg to pay the costs.*