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Judgment of the Court of 17 November 1993. - Commission of the European Communities v Kingdom of Spain. - Value added tax - Sixth directive - Advertising services. - Case C-73/92.

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Keywords

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1. 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 activity

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

2. Actions against Member States for failure to fulfil obligations ° Objective nature ° Whether account may be taken of incorrect interpretation of Community legislation ° Not permitted

(EEC Treaty, Art. 169)

Summary

1. 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 free distribution of goods, the supply of services at reduced prices or free of charge, or the organization of a cocktail party or a banquet, if that activity involves conveying a message intended to inform the public of the existence and qualities of the product or service which is the subject-matter of that activity, with a view to increasing sales of that product or service.

2. An action for failure to fulfil obligations brought under Article 169 of the EEC Treaty is objective in nature. In the context of such an action, it is for the Court to decide whether or not the Member State in question has failed to fulfil its obligations as alleged, and the fact that such a failure results from a Member State's incorrect interpretation of the Community-law provisions in question cannot preclude the Court from declaring that there has been such a failure.

Parties

In Case C-73/92,

Commission of the European Communities, represented by Daniel Calleja y Crespo, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Nicola Anecchino, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented by Alberto José Navarro González, Director-General for Community Legal and Institutional Coordination, and Antonio Hierro Hernández-Mora, Abogado del Estado, of the State Legal Service, 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 instituting and maintaining in force a system of VAT applicable to advertising services which excludes certain transactions, such as promotional activities, from that concept, contrary to 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 Kingdom of Spain has failed to fulfil its obligations 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. 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, at which the Commission of the European Communities was represented by José Luis Iglesias Buhigues, Legal Adviser, acting as Agent,

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

gives the following

Grounds

1 By application lodged at the Court Registry on 10 March 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by instituting and maintaining in force a system of VAT applicable to advertising services which excludes certain transactions, such as promotional activities, from that concept, contrary to 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 Kingdom of Spain has failed to fulfil its obligations 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 into Spanish law by Article 13(2)(5)(b) of Law No 30/85 of 2 August 1985 instituting VAT (*Boletín Oficial del Estado* (Official State Gazette) No 190 of 9 August 1985). So far as "advertising services" are concerned, that article reproduces the abovementioned rule in Article 9(2)(e) of the Sixth Directive. The third subparagraph of Article 22(5) of the *Reglamento del Impuesto sobre el Valor Añadido* (the Spanish VAT regulation), adopted by Royal Decree No 2028/85 of 30 October 1985 (*Boletín Oficial del Estado* No 261 of 31 October 1985), defines "advertising services" as follows:

"services supplied under contracts for advertising, advertising production contracts and advertising dissemination or tariff contracts".

6 According to the documents before the Court, the Spanish authorities stated by letter of 20 December 1989, in reply to a request by the Commission for information, that under Spanish law so-called promotional activities in the form of the provision of hotel services or recreational activities such as the supply of food or meals, the organization of shows, games, competitions, parties or any similar events, could not be regarded as constituting advertising services.

7 Since it took the view that the national system in question was contrary to Article 9(2)(e) of the Sixth Directive in so far as it excluded from the concept of advertising certain transactions such as promotional activities, the Commission initiated against the Kingdom of Spain the procedure laid down in Article 169 of the EEC Treaty.

8 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.

9 At the hearing the Commission explained that its action was directed solely against the exclusion, under Spanish law, of promotional activities from the concept of advertising services.

10 The Spanish Government argues that this exclusion is not contrary to Article 9(2)(e) of the Sixth Directive. In particular, it claims that promotional activities have a specific content which distinguishes them from advertising services.

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

12 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.

13 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.

14 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.

15 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.

16 It is therefore sufficient that a promotional activity, such as the sale of goods at reduced prices, the free distribution of products, the supply of services at reduced prices or free of charge, or the organization of a cocktail party or banquet, should involve the conveying 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 that activity to be characterized as an advertising service within the meaning of Article 9(2)(e) of the Sixth Directive.

17 It follows that, in so far as it excludes promotional activities from the concept of advertising services, even where those activities satisfy the above criteria, the Spanish tax system is contrary to Article 9(2)(e) of the Sixth Directive.

18 According to the Spanish Government, even if the Court were to reject its view on the interpretation of Article 9(2)(e) of the Sixth Directive, it cannot declare that Spain has failed to fulfil its obligations under Community law since the wording of the disputed provision had not been adequately defined by the competent Community institutions.

19 That argument cannot be upheld. An action for failure to fulfil obligations is objective in nature and in the context of such an action it is for the Court to decide whether or not the Member State in question has failed to fulfil its obligations as alleged (see the judgments in Case 415/85 *Commission v Ireland* [1988] ECR 3097, paragraph 9, and in Case 416/85 *Commission v United Kingdom* [1988] ECR 3127, paragraph 9). The fact that a failure to fulfil obligations results from a Member State's incorrect interpretation of the Community-law provisions in question cannot preclude the Court from declaring that there has been such a failure.

20 It follows that, by instituting and maintaining in force a system of VAT applicable to advertising services which excludes promotional activities from that concept, even where those activities involve conveying a message intended to inform consumers of the existence and qualities of the product or service that is the subject-matter of those activities, with a view to increasing sales of that product or service, the Kingdom of Spain has failed to fulfil its obligations under the Sixth Directive, in particular Article 9(2)(e), and under the EEC Treaty.

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 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 instituting and maintaining in force a system of VAT applicable to advertising services which excludes promotional activities from that concept, even where those activities involve conveying a message intended to inform consumers of the existence and qualities of the product or service that is the subject-matter of those activities, with a view to increasing sales of that product or service, the Kingdom of Spain has failed to fulfil its obligations under 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, in particular Article 9(2)(e), and under the EEC Treaty;

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