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Judgment of the Court of 12 September 2000. - Commission of the European Communities v Ireland. - Failure to fulfil obligations - Article 4(5) of the Sixth VAT Directive - Access to roads on payment of a toll - Failure to levy VAT - Regulations (EEC, Euratom) Nos 1552/89 and 1553/89 - Own resources accruing from VAT. - Case C-358/97.

European Court reports 2000 Page I-06301

Keywords

1. Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Supply of services for consideration - Definition - Provision of roads infrastructure on payment of a toll - Whether included

(Council Directive 77/388, Art. 2, para. 1)

2. Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Taxable persons - Bodies governed by public law - Activities in the exercise of public authority not taxable - Definition

(Council Directive 77/388, Art. 4(5))

3. Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Exemptions provided for by the Sixth Directive - Exemption for the letting of immovable property - Definition - Provision of roads infrastructure on payment of a toll - Whether excluded

(Council Directive 77/388, Art. 13B(b))

4. Own resources of the European Community - Resources accruing from value added tax - Arrangements for collection - Corrections to the annual statement - Time-limit - Initiation by the Commission of the procedure for failure to fulfil obligations seeking the retrospective payment of such resources - Application by analogy - Justified by considerations of legal certainty

(Council Regulation No 1553/89, Art. 9(2))

Summary

1. The provision of roads infrastructure on payment of a toll constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes. Use of the road depends on payment of a toll, the amount of which varies inter alia according to the category of vehicle used and the distance covered. There is, therefore, a direct and necessary link between the service provided and the financial consideration received.

(see paras 33-34)

2. In order for the exemption from value added tax for bodies governed by public law, provided for by the first subparagraph of Article 4(5) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, to apply as regards activities or transactions in which they engage as public authorities, two conditions must be fulfilled: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. As regards the latter condition, activities pursued as public authorities are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders.

(see paras 37-38)

3. Leaving aside the specific cases expressly listed in Article 13B(b) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, the term letting of immovable property must be construed strictly since it constitutes an exception to the general VAT rules contained in that directive. Accordingly, that term cannot be considered to cover contracts, such as those for the provision of roads infrastructure on payment of a toll, in which the parties have not agreed on any duration for the right of enjoyment of the immovable property, which is an essential element of a contract to let.

(see paras 55-56)

4. Despite the absence of a limitation period for the recovery of VAT in either the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes or in the legislation relating to the Communities' own resources, the fundamental requirement of legal certainty may have the effect of preventing the Commission from indefinitely delaying, in the course of a procedure for failure to fulfil obligations seeking the retrospective payment of own resources, a decision to bring proceedings. Article 9(1) of Regulation No 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax does not refer to the situation in which the procedure for failure to fulfil obligations under Article 169 of the Treaty (now Article 226 EC) has been initiated, but demonstrates none the less the requirements pertaining to legal certainty in budgetary matters by ruling out any correction to the annual statement after four budgetary years have elapsed. It is clear that the same considerations of legal certainty justify the application by analogy of the rule laid down by that provision where the Commission decides to initiate the procedure for failure to fulfil obligations in order to seek retrospective payment of own resources accruing from VAT.

(see paras 71-72, 75-76)

Parties

In Case C-358/97,

Commission of the European Communities, represented by H. Michard and B. Doherty, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of its Legal service, Wagner Centre, Kirchberg,

applicant,

v

Ireland, represented by M.A. Buckley, Chief State Solicitor, acting as Agent, assisted by D. Sherlock, Deputy Revenue Solicitor, T. McCann SC and D. Moloney BL, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that by not subjecting tolls for the use of toll roads and toll bridges in Ireland to value added tax, contrary to Articles 2 and 4(1), (2) and (5) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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 by failing to make available to the Commission the amounts of own resources and interest for late payment as a consequence of that infringement, Ireland has failed to fulfil its obligations under the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), L. Sevón, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann, H. Ragnemalm, V. Skouris and F. Macken, Judges,

Advocate General: S. Alber,

Registrar: D. Louterman-Hubeau and H.A. Rühl, Principal Administrators,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 November 1999, at which the Commission was represented by H. Michard and B. Doherty and Ireland was represented by T. McCann and P. Hunt BL,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2000,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 21 October 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that by not subjecting tolls for the use of toll roads and toll bridges in Ireland to value added tax (hereinafter VAT), contrary to Articles 2 and 4(1), (2) and (5) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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 by failing to make available to the Commission the amounts of own resources and interest for late payment as a consequence of that infringement Ireland had failed to fulfil its obligations under the EC Treaty.

Legal background

2 Article 2 of the Sixth Directive provides as follows:

The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.

3 According to Article 4(1), (2) and (5) of the Sixth Directive:

1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph (2), whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph (1) shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

...

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

Member States may consider activities of these bodies which are exempt under Article 13 or 28 as activities which they engage in as public authorities.

4 It is common ground that providing access to roads and related infrastructures (hereinafter roads) on payment of a toll is not one of the activities listed in Annex D to the Sixth Directive.

5 Article 13B of the Sixth Directive provides:

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday

camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption.

...

6 Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ 1989 L 155, p. 9), which replaced with effect from 1 January 1989 Council Regulation (EEC, Euratom, ECSC) No 2892/77 of 19 December 1977 implementing in respect of own resources accruing from value added tax the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336, p. 8), last amended by Council Regulation (ECSC, EEC, Euratom) No 3735/85 of 20 December 1985 (OJ 1985 L 356, p. 1), provides in Article 1:

VAT resources shall be calculated by applying the uniform rate, set in accordance with Decision 88/376/EEC, Euratom, to the base determined in accordance with this regulation.

7 Under Article 2(1) of Regulation No 1553/89:

The VAT resources base shall be determined from the taxable transactions referred to in Article 2 of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment as last amended by [Directive] 84/386/EEC, with the exception of transactions exempted under Articles 13 to 16 of that directive.

8 Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom, on the system of the Community's own resources (OJ 1989 L 155, p. 1), applicable from 1 January 1989, which repealed Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336, p. 1), last amended by Council Regulation (ECSC, EEC, Euratom) No 1990/88 of 30 June 1988 (OJ 1988 L 176, p. 1), provides in Article 9(1):

In accordance with the procedure laid down in Article 10, each Member State shall credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.

9 Under Article 11 of Regulation No 1552/89:

Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by 2 percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.

Pre-litigation procedure

Procedure relating to the Sixth Directive

10 The Commission raised the question of VAT on tolls in a letter to the Irish authorities of 3 March 1987. The authorities replied by letter of 14 December 1987.

11 By letter of 20 April 1988 the Commission informed the Irish Government that it considered that the failure to levy VAT on the tolls collected for the use of the East Link Bridge in Dublin was contrary to Articles 2 and 4 of the Sixth Directive. It gave the Irish Government formal notice, pursuant to Article 169 of the Treaty, that it should submit its observations on this subject within two months.

12 On 17 October 1988 the Irish authorities replied that the tolls in question represented the letting of immovable property and as such were exempt from VAT under Article 13 of the Sixth Directive.

13 The Commission considered that the explanations given by the Irish authorities were not satisfactory, and therefore by letter of 19 October 1989 sent the Irish Government a reasoned opinion primarily to the effect that Ireland was failing to fulfil its obligations under the Sixth Directive. Accordingly, it called on that Member State to take the measures necessary to fulfil those obligations within two months.

14 By letter of 12 October 1990 the Irish authorities reiterated their view and cited Article 4(5) of the Sixth Directive in support of their defence.

The procedure relating to the system of own resources

15 By letter of 27 November 1987, the Commission pointed out to the Irish authorities that the VAT which should have been collected on the tolls for the East Link Bridge had to be taken into account in the assessment of the amount to be contributed to the Community budget under the system of Community own resources.

16 In their reply of 22 April 1988 the Irish authorities stated that since in their view VAT was not chargeable on the East Link bridge toll they did not consider that they owed own resources accruing from VAT (hereinafter VAT own resources) in respect of this activity.

17 On 31 January 1989 the Commission sent the Irish Government a letter of formal notice regarding its failure to comply with the rules relating to the Communities' own resources. The Commission requested inter alia that the Irish authorities make the calculations necessary to ascertain the amount of VAT own resources unpaid for the financial years 1984 to 1986 and that those amounts be paid to it, with interest for late payment as from 31 March 1988. The Commission also requested that for the years subsequent to 1986 the necessary calculations be made to determine the amount of own resources due each year and that those amounts be made available to it by the first working day of August the following year, with interest for late payment where applicable.

18 The Irish authorities replied to that letter of formal notice by letter of 4 October 1989.

19 As the reply of the Irish Government was not considered satisfactory the Commission, by the reasoned opinion of 19 October 1989 mentioned at paragraph 13 of this judgment, also claimed that Ireland had failed to comply with the Community rules relating to own resources.

20 The Irish Government replied to the reasoned opinion, as regards own resources, by letter of 23 May 1990.

21 As the replies of the Irish Government to the reasoned opinion were not considered satisfactory, the Commission brought this action concerning both the alleged infringement of

provisions of the Sixth Directive and the repercussions of that infringement on the payment of the Communities' own resources.

Substance

22 By its action the Commission claims, first, that Ireland did not comply with the provisions of the Sixth Directive by failing to subject to VAT tolls collected as consideration for the use of toll roads and toll bridges, and, second, that it breached the rules relating to the system of the Communities' own resources by not paying in to the Community budget the VAT own resources relating to the sums which should have been collected by way of VAT on those tolls.

The first claim

23 The Commission submits that providing access to roads on payment of a toll by the user is an economic activity within the meaning of Articles 2 and 4 of the Sixth Directive. That activity must be considered to be a supply of services carried out by a taxable person in the course of the exploitation of property for the purpose of obtaining income therefrom on a continuing basis, within the meaning of Article 4(1) and (2) of the Sixth Directive.

24 The fact that this activity is carried out, as it is in Ireland, by private operators under special rules cannot, in its view, remove the transactions in question from the scope of the Sixth Directive.

25 In that regard, the Commission points out that under the first paragraph of Article 4(5) of the Sixth Directive it is only in respect of activities or transactions in which they engage as public authorities that bodies governed by public law are not considered to be taxable persons. The activity at issue does not come into that category, as it does not fall within the core responsibilities of public authority which can never be delegated to private bodies, bearing in mind that the rule that bodies governed by public law are not taxable persons must be interpreted strictly.

26 Moreover, the exemption referred to in the preceding paragraph can in any event only be relied on if the activity at issue is carried out by a body governed by public law.

27 The Court notes, first, that by including amongst the taxable transactions defined in Article 2 not only the importation of goods but also the supply of goods or services effected for consideration within the territory of a country and by defining taxable person in Article 4(1) as any person who independently carries out an economic activity, whatever the purpose or results of that activity, the Sixth Directive attributes to VAT a very wide scope (Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 6).

28 Economic activities are defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services. In particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis is also to be considered an economic activity.

29 An analysis of those definitions shows that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (Commission v Netherlands, cited above, paragraph 8).

30 In view of the scope of the term economic activities it must be held that, in providing access to roads in return for payment, operators in Ireland are carrying out an economic activity within the meaning of the Sixth Directive.

31 In view of the objective character of the term economic activities, the fact that the activity in question consists in the performance of duties which are conferred and regulated by law in the public interest is irrelevant. Indeed, Article 6 of the Sixth Directive expressly provides that certain activities carried on in pursuance of the law are to be subject to the system of VAT (Commission v

Netherlands, cited above, paragraph 10).

32 It must also be remembered that according to the case-law of the Court (in particular Case 102/86 Apple and Pear Development Council v Commissioners of Customs and Excise [1988] ECR 1443, paragraph 12, and Case C-258/95 Fillibeck v Finanzamt Neustadt [1997] ECR I-5577, paragraph 12), the concept of the supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive requires the existence of a direct link between the service provided and the consideration received.

33 As the Commission rightly submitted, providing access to roads on payment of a toll fits that definition. Use of the road depends on payment of a toll, the amount of which varies inter alia according to the category of vehicle used and the distance covered. There is, therefore, a direct and necessary link between the service provided and the financial consideration received.

34 Accordingly, providing access to roads on payment of a toll constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

35 It must therefore be ascertained whether, as the Irish Government contends, the operators in question are entitled to the exemption provided for by Article 4(5) of the Sixth Directive in respect of the activity of providing access to roads on payment of a toll.

36 The first paragraph of that article provides that bodies governed by public law are not considered to be taxable persons in respect of activities or transactions in which they engage as public authorities.

37 As the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see, in particular, Case C-202/90 Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas Primera y Segunda [1991] ECR I-4247, paragraph 18).

38 As regards the latter condition, it is clear from the settled case-law of the Court of Justice (Joined Cases 231/87 and 129/88 Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola and Others v Comune di Carpaneto Piacentino and Others [1989] ECR 3233, paragraph 16; Case C-4/89 Comune di Carpaneto Piacentino and Others v Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza [1990] ECR I-1869, paragraph 8, and Case C-247/95 Finanzamt Augsburg-Stadt v Marktgemeinde Welden [1997] ECR I-779, paragraph 17) that activities pursued as public authorities within the meaning of the first paragraph of Article 4(5) of the Sixth Directive are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders.

39 In the light of that case-law, the Commission's argument (see paragraph 25 of this judgment) that a body acts as a public authority only in respect of activities falling within the definition of public authority in the strict sense of that term, which do not include providing access to roads on payment of a toll, must be rejected.

40 The Commission, whose legal argument has thus not been upheld by the Court, has not established, or even sought to establish, that in the present case the traders in question are operating under the same conditions as a private trader within the meaning of the case-law of the Court of Justice. In contrast, Ireland took pains to demonstrate that the activity in question was carried out by those traders under a special legal regime applicable to them within the meaning of the same case-law.

41 Accordingly, it must be held that the Commission has failed to put before the Court the evidence required to substantiate the alleged failure to fulfil obligations as regards the condition relating to pursuance of an activity as a public authority.

42 However, as also noted in paragraph 37 of this judgment, the non-taxable status provided for in Article 4(5) of the Sixth Directive requires that the activities be carried out not only as a public authority but also by a body governed by public law.

43 In that regard the Court has held that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority (Commission v Netherlands, cited above, paragraph 21, and Ayuntamiento de Sevilla, cited above, paragraph 19). The Court held, in paragraph 20 of the latter judgment, that it follows that if a commune entrusts the activity of collecting taxes to an independent third party the exclusion from VAT provided for by Article 4(5) of the Sixth Directive is not applicable. Similarly, the Court held in paragraph 22 of the judgment in Commission v Netherlands, cited above, that even assuming that in performing their official services notaries and bailiffs in the Netherlands exercise the powers of a public authority by virtue of their appointment to public office, they cannot enjoy the exemption provided for in Article 4(5) of the Sixth Directive because they pursue those activities, not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession.

44 In the present case it is common ground that, in Ireland, the activity of providing access to roads on payment of a toll is carried out by traders governed by private law. Accordingly, the exemption provided for by Article 4(5) of the Sixth Directive is not applicable.

45 However, the Irish Government considers that providing access to roads on payment of a toll represents a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive, and as such is exempt from VAT under that provision.

46 According to the Irish Government, since VAT is a tax on the supply of goods and services the question arises as to the nature of the principal item received as consideration for the payment. In the case of payment of a road toll the chief benefit conferred is the right to use the toll road, so that the transaction falls within Article 13B(b).

47 Contrary to the submission of the Commission, the term letting as used in Article 13B(b) does not, the Irish Government contends, imply a right of exclusive occupation. The requirement of a fixed duration for the right to use the goods in question is met in so far as the agreed period of time is that required for a driver to travel along the toll road or bridge. In that provision the concept of letting differs from that of leasing, the latter term implying a longer period of time than that implied by letting.

48 The Irish Government considers that letting within the meaning of Article 13B(b) of the Sixth Directive includes, as in Irish law, the granting of rights of way or easements over property. The Commission failed to take proper account of the concept of short term lettings and mistakenly concentrated on leasing of property.

49 Finally, the fact that letting of immovable property does not always, contrary to the Commission's claim, require a classic landlord and tenant relationship is clear from the structure of Article 13B(b) itself, which lists four activities as being excluded from the exemption, clearly implying that the activities listed - which include the letting of sites for parking vehicles - are themselves forms of leasing or letting of immovable property.

50 In the view of the Irish Government the nature of the transaction in paying for car parking is very similar to the transaction involved in paying a toll. Given the similarities and given that, according to the Sixth Directive, the letting of immovable property expressly includes the service offered for parking fees, it is reasonable to infer that the same applies to the services offered in exchange for a toll.

51 It should be observed at the outset that according to settled case-law the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law (see Case 348/87 Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën [1989] ECR 1737, paragraph 11, Case C-453/93 Bulthuis-Griffioen v Inspecteur der Omzetbelasting [1995] ECR I-2341, paragraph 18, and Case C-2/95 SDC v Skatteministeriet [1997] ECR I-3017, paragraph 21). They must therefore be given a Community definition.

52 It is also settled case-law that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, inter alia, Stichting Uitvoering Financiële Acties, cited above, paragraph 13, Bulthuis-Griffioen, cited above, paragraph 19, SDC, cited above, paragraph 19, and Case C-216/97 Gregg v Commissioners of Customs and Excise [1999] ECR I-4947, paragraph 12).

53 In that regard, it must be observed that the wording of Article 13B(b) of the Sixth Directive does not shed any light on the scope of the terms leasing or letting of immovable property.

54 The definition of letting of immovable property under that provision is certainly wider in some respects than that enshrined in various national laws. For instance the article lists, in order to exclude it from the exemption, a contract for a hotel room (the provision of accommodation ... in the hotel sector), which, in view of the overriding importance of the services provided by the hotelier and the control he retains over the use of the premises by patrons, is not considered, in some national laws, to be a contract to let.

55 Leaving aside the specific cases expressly listed in Article 13B(b) of the Sixth Directive, however, the term letting of immovable property must be construed strictly. As pointed out in paragraph 52 of this judgment, it constitutes an exception to the general VAT rules contained in that directive.

56 Accordingly, that term cannot be considered to cover contracts in which, as here, the parties have not agreed on any duration for the right of enjoyment of the immovable property, which is an essential element of a contract to let.

57 Where access to roads is provided, what interests the user is the possibility offered to him of making a particular journey rapidly and more safely. The duration of the use of the road is not a factor taken into account by the parties, in particular in determining the price.

58 In the light of the foregoing considerations, it must be held that by failing to subject to VAT tolls collected for the use of toll roads and toll bridges as consideration for the service supplied to users, when that service is not provided by a body governed by public law within the meaning of Article 4(5) of the Sixth Directive, Ireland has failed to fulfil its obligations under Articles 2 and 4 of that directive.

The second claim

59 The Commission observes that the Community rules on the collection of VAT own resources are contained in Regulation No 1553/89, which replaced with effect from 1 January 1989 Regulation No 2892/77, as amended.

60 Where a taxable person carries out a transaction falling within Articles 2 and 4 of the Sixth Directive, the ultimate consumer of that supply of goods or services is liable to VAT, and the provisions relating to the payment of VAT own resources are correspondingly applicable to the Member State in which the VAT was collected.

61 The Commission submits that where the Sixth Directive has been breached and the basis of assessment of VAT own resources thereby reduced it must be credited with the amount of own resources attributable to the tax which should have been collected, or suffer financial disadvantage which must be made good out of the gross domestic product. Such breaches therefore cause financial damage to the other Member States and consequently subvert the principle of equality.

62 As regards interest for late payment the Commission notes that the Court has held that the default interest provided for by Article 11 of Regulation No 1552/89 is payable in respect of any delay, regardless of the reason for the delay in making the entry in the Commission's account (see, for example, Case 54/87 Commission v Italy [1989] ECR 385, paragraph 12).

63 The Commission considers that it gave the Irish Government sufficient time to remedy the infringement and drew its attention to the fact that, from 31 March 1988, interest for late payment was due for the amounts of VAT own resources which had not been paid by Ireland as a result of its failure to levy VAT on road tolls.

64 It must be observed that under Article 1 of Regulation No 1553/89 VAT own resources are calculated by applying the uniform rate to the base determined in accordance with that regulation and that under Article 2(1) of the regulation that base is determined from the taxable transactions referred to in Article 2 of the Sixth Directive.

65 Since VAT was not levied on the tolls collected as consideration for the use of certain roads in Ireland, the corresponding amounts were not taken into account in determining the VAT own resources base, with the result that Ireland has thereby also breached the rules relating to the system of the Community's own resources.

66 Moreover, the interest for late payment claimed by the Commission has its basis in Article 11 of Regulation No 1552/89. As the Commission rightly pointed out, the default interest is payable regardless of the reason for the delay in making the entry in the Commission's account (see, in particular, Commission v Italy, cited above, paragraph 12).

67 The Irish Government objects, however, that Article 9 of Regulation No 1553/89 and Article 11 of Regulation No 1552/89 entitle the Commission to require additional payments and interest for late payment only if the infringement of Community legislation results in the payment of an

insufficient amount by way of the Communities' own resources. That is not the case here.

68 First, Ireland's contribution to the Communities' own resources was reduced from 1988 pursuant to Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources (OJ 1988 L 185, p. 24), and Council Decision 94/728/EC, Euratom of 31 October 1994 on the system of the European Communities' own resources (OJ 1994 L 293, p. 9), and the resulting total amount paid each year. Second, while for the years 1985 to 1987 there was a shortfall in Ireland's contribution to the Communities' own resources of IEP 39 686, Ireland seeks to set off against that sum the overpayment of its contribution in 1984, which, it claims, amounts to IEP 90 820, leaving a final balance of IEP 51 134 due to Ireland.

69 In that regard, it is sufficient to note that whilst, as the Commission conceded at the hearing, the financial consequences of the correct application of the Sixth Directive must be assessed when this judgment is enforced, those consequences cannot, in any event, affect the finding made in paragraph 65 of this judgment that Ireland did not comply with the rules relating to the system of the Communities' own resources in connection with the tolls collected as consideration for providing access to certain roads.

70 However, it is necessary to consider whether the extent of Ireland's obligation to make retrospective payments where appropriate under the rules relating to the Communities' own resources is affected by the fact that over seven years elapsed between the notification of the reasoned opinion and the bringing of this action.

71 Despite the absence of a limitation period for the recovery of VAT in either the Sixth Directive (Case C-85/97 SFI v Belgian State [1998] ECR I-7447, paragraph 25) or in the legislation relating to the Communities' own resources, the fundamental requirement of legal certainty may have the effect of preventing the Commission from indefinitely delaying, in the course of a procedure for failure to fulfil obligations seeking the retrospective payment of own resources, the decision to bring proceedings (see, mutatis mutandis, Case 57/69 ACNA v Commission [1972] ECR 933, paragraph 32).

72 In that regard, it should be borne in mind that, under Article 7(1) of Regulation No 1553/89, the Member States must send the Commission a statement of the total amount of the VAT own resources base for the previous calendar year, to which the uniform rate referred to in Article 1 is to be applied in order for VAT own resources to be determined.

73 Under Article 9(1) of Regulation No 1553/89, any corrections, for whatever reason, to the statements referred to in Article 7(1) for previous financial years are to be made in agreement between the Commission and the Member State concerned. If the Member State does not give its agreement, the Commission, after re-examining the matter, is to take whatever measures it considers necessary for correct application of that regulation.

74 Article 9(2) of that regulation provides:

No further corrections may be made to the annual statement referred to in Article 7(1) after 31 July of the fourth year following the financial year concerned, unless they concern points previously notified either by the Commission or by the Member State concerned.

75 That provision does not refer to the situation in which the procedure for failure to fulfil obligations under Article 169 of the Treaty has been initiated, but demonstrates none the less the requirements pertaining to legal certainty in budgetary matters by ruling out any correction after four budgetary years have elapsed.

76 It is clear that the same considerations of legal certainty justify the application by analogy of the rule laid down by that provision where the Commission decides to initiate the procedure for failure

to fulfil obligations in order to seek retrospective payment of VAT own resources.

77 Accordingly the Commission, which did not bring this action until 21 October 1997, can seek retrospective payment of VAT own resources with interest for late payment only as from the 1994 budgetary year.

78 Having regard to all the foregoing considerations, it must be held that by failing to make available to the Commission as VAT own resources the amounts corresponding to the VAT which should have been levied on tolls collected for the use of toll roads and toll bridges, together with interest for late payment, Ireland has failed to fulfil its obligations under Regulations Nos 1553/89 and 1552/89.

Decision on costs

Costs

79 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for an order for costs against Ireland and the latter has been unsuccessful in the main, Ireland must be ordered to bear the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Declares that by failing to subject to value added tax tolls collected for the use of toll roads and toll bridges as consideration for the service supplied to users, when that service is not provided by a body governed by public law within the meaning of Article 4(5) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, and by failing to make available to the Commission of the European Communities as own resources accruing from value added tax the amounts corresponding to the tax which should have been levied on those tolls together with interest for late payment, Ireland has failed to fulfil its obligations under Articles 2 and 4 of that directive and under Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax and Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources.

2. Orders Ireland to bear the costs.