|

61999J0404

Judgment of the Court (Fifth Chamber) of 29 March 2001. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Sixth VAT Directive - Taxable amount - Exclusion - Service charges. - Case C-404/99.

European Court reports 2001 Page I-02667

Keywords

Tax provisions Harmonisation of laws Turnover taxes Common system of value added tax Taxable amount Service charges Included

(Council Directive 77/388, Arts 2(1) and 11A(1)(a))

Summary

$$A Member State which authorises, under certain conditions, the exclusion from the taxable amount for the purposes of value added tax of the compulsory price supplements claimed by certain taxable persons by way of remuneration for the service provided (service charges) is in breach of its obligations under Articles 2(1) and 11A(1)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes.

The total sum demanded from the customer, or appearing on the bill presented to him, constitutes in its entirety the consideration for the service supplied to him by the service provider. That consideration, which includes the service charge, is by definition expressed in money.

(see paras 39, 52 and operative part)

Parties

In Case C-404/99,

Commission of the European Communities, represented by E. Traversa, acting as Agent, assisted by N. Coutrelis, avocat, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and S. Seam, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by authorising, under certain conditions, the exclusion from the taxable amount for the purposes of value added tax of the service charges claimed by certain taxable persons, the French Republic has failed to fulfil its obligations under Articles 2(1) and 11A(1)(a) 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),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 November 2000,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 22 October 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by authorising, under certain conditions, the exclusion from the taxable amount for the purposes of value added tax (VAT) of the service charges claimed by certain taxable persons, the French Republic has failed to fulfil its obligations under Articles 2(1) and 11A(1)(a) 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).

The Community rules

2 Article 2(1) of the Sixth Directive provides:

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.

3 Article 11A(1)(a) and (3) of that directive provides:

1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies;

...

3. The taxable amount shall not include:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply;

(c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account. The taxable person must furnish proof of the actual amount of this expenditure and may not deduct any tax which may have been charged on these transactions.

The national rules and administrative practice

4 The provisions of Community law cited in paragraphs 2 and 3 of this judgment were transposed into French law by Articles 266(1)(a) and 267-I of the Code Général des Impôts (General Tax Code, hereinafter the Code).

5 Article 266(1)(a) of the Code provides:

The taxable amount shall be:

(a) in respect of supplies of goods and services and intra-Community acquisitions, all sums, assets, goods or services received or receivable by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies.

6 According to Article 267-I of the Code:

The taxable amount shall include:

1. Taxes, duties, levies and charges of any kind, excluding the value added tax itself;

2. Expenses incidental to supplies of goods or services, such as commissions, interest, packing, transport and insurance costs charged to customers.

7 The present infringement proceedings concern the system for levying VAT on tips or service charges, that is to say, compulsory price supplements which are included in the total price charged to the customer and which are generally borne by the customer by way of remuneration for the service provided in certain establishments (hereinafter referred to as a service charge). A service charge is to be distinguished from gratuities or voluntary tips paid by the customer spontaneously

and directly to employees of the establishment in question as a token of his satisfaction, over and above the service charge itself.

8 Under French law, the taxable amount for VAT purposes is in principle composed, as regards supplies of services, of the total price paid by the customer in consideration of the services rendered to him, including service charges. The following indication to that effect appears in a text featuring in the Bulletin Officiel de la Direction Générale des Impôts (Official Bulletin of the Directorate-General for Taxation) (BOGDI 3 B-4-76) which is reproduced in the basic documentation dated 20 June 1995 (DB 3 B-1123, No 31) and published by the Directorate-General for Taxation, and on which taxpayers may rely for the purposes of ascertaining their tax liabilities:

according to the fixed policy of the administration, price supplements charged by way of a tip to customers of commercial undertakings [hotels, restaurants, cafés, brasseries, bars, tea-rooms, hairdressing establishments, clinics, hydropathic establishments, transport and removal undertakings, rest and retirement homes, casinos and undertakings making home deliveries of any type of product] constitute part of the price on which value added tax is to be levied.

9 However, the abovementioned basic documentation states that, according to an administrative concession applied since 1923 by the French administrative authorities and confirmed by an administrative instruction of 31 December 1976 (DB 3 B-1123, No 32, hereinafter the 1976 instruction), service charges may be excluded from the amount of the turnover tax paid by an employer, that tax having been replaced in France by VAT. Four conditions must be fulfilled in order for the concession to apply:

the customer must have been informed in advance of the existence and percentage of a levy in the nature of a service charge which is added to the price excluding service;

the amount thus levied must be shared out in full between the staff members having direct contact with the customers;

that payment to the staff must be accounted for by the keeping of a special register initialled in the margin by each recipient or, at the very least, by a staff representative;

the employer must show on the annual wages statement the amount of the remuneration of that kind actually received by the members of his staff.

The pre-litigation procedure

10 The Commission took the view that the exemption from VAT resulting, with respect to service charges, from the administrative concession confirmed by the 1976 instruction was contrary to Articles 2(1) and 11A(1)(a) of the Sixth Directive, and therefore communicated its complaints in that regard to the French Government by letter of 15 April 1998, requesting it to submit its observations within two months from receipt of that letter.

11 On 17 November 1998 the Commission, having received no reply, issued a reasoned opinion calling upon the French Government to take the requisite measures to comply with that opinion within two months from the date of its notification.

12 No response was sent to the Commission by the French Government following the despatch of that reasoned opinion. In those circumstances, the Commission considered that the conditions for bringing proceedings before the Court under the second paragraph of Article 226 EC were satisfied, and therefore decided to bring the present action against the French Republic.

Substance

Arguments of the parties

13 The Commission claims in its application that, although Articles 266(1)(a) and 267-I of the Code correctly transpose Articles 2(1) and 11A(1)(a) of the Sixth Directive, that is not the case as regards the administrative concession confirmed by the 1976 instruction, which preserves a system of exemption from VAT that is contrary to Community law.

14 In that regard, the Commission argues, first, that, according to settled case-law (see Case C-16/93 Tolsma [1994] ECR I-743, paragraph 13, and the cases cited therein), the taxable amount in respect of a supply of services is everything received by way of consideration for the service provided, and the taxable amount as defined in Article 11A(1)(a) of the Sixth Directive consists of the consideration actually received.

15 In the Commission's view, a service charge undeniably forms an integral part of the total price paid by the customer for the service rendered by the supplier. It is therefore that total price, including the service charge, which constitutes the consideration actually received on which VAT is payable in accordance with the abovementioned case-law.

16 The Commission states that its application is solely concerned with service charges, which are paid on a compulsory basis by the customer and the amount of which is determined in advance, and not with tips paid spontaneously and without compulsion by the customer to a given employee. In its view, the latter type of tip, which is purely optional, is comparable to a donation given by a passer-by to a barrel-organ player, in that it likewise involves a payment which is entirely voluntary and uncertain, the amount of which is practically impossible to determine and which, according to the judgment in Tolsma (paragraph 19), is not liable to VAT.

17 Next, the Commission observes that Article 11A(3) is the only provision in the Sixth Directive allowing sums to be excluded from the taxable amount for VAT purposes. However, the administrative concession confirmed by the 1976 instruction, which derogates from the rules laid down by Articles 2(1) and 11A(1)(a) of the Sixth Directive, does not fall within any of the situations covered by Article 11A(3) of that directive. Consequently, the French tax authorities should not under any circumstances allow service providers to exclude from their taxable amount for VAT purposes sums corresponding to a service charge.

18 Lastly, the Commission maintains that application of the administrative concession confirmed by the 1976 instruction violates the principle of neutrality inherent in the common system of VAT. According to the Commission, that neutrality, which is designed to promote competition (Case 126/78 Nederlandse Spoorwegen [1979] ECR 2041, paragraph 7), is based on the premiss that, within each country, similar goods or services should bear the same tax burden.

19 The Commission argues that the principle of fiscal neutrality precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned (Case C-216/97 Gregg [1999] ECR I-4947, paragraph 20).

20 In its view, the system of exemption from VAT resulting from application of the administrative concession confirmed by the 1976 instruction constitutes a distortion of competition between suppliers who impose a service charge. Thus, an absolutely identical service offered by two competing suppliers will be taxed differently if only one of them is in a position to fulfil the conditions imposed by the authorities for exclusion of that service charge from the taxable amount for VAT purposes.

21 According to the Commission, that distortion of competition is linked to the purely formal conditions laid down by the French Government for eligibility for exemption. Those conditions have no basis whatever in law and are totally extraneous to the fundamental criterion governing determination of the taxable amount for VAT purposes, namely the consideration actually received by the service provider.

22 In its defence, the French Government observes, first of all, that the Commission acknowledges in point 7 of its application that Article 266(1)(a) of the Code correctly transposes Articles 2(1) and 11A(1)(a) of the Sixth Directive. It contends that the exclusion of service charges from the taxable amount for VAT purposes does not constitute a rule modifying Article 266(1)(a) of the Code, being instead a mere administrative concession which undertakings are free to apply or not as they think fit.

23 Consequently, according to the French Government, the whole of the price paid by the customer constitutes in principle the taxable amount for VAT purposes of supplies made by undertakings, but it has been accepted, in relation to certain undertakings only, that the price element constituting remuneration for the service provided should not be liable to VAT.

24 The French Government adds that the concession in question has been in existence for a long time, since it dates back to a ministerial decision of 8 August 1923. The aim of that concession can be discerned from its historical context. The decision to exempt tips from turnover tax was taken at a time when the remuneration of employees having contact with customers was essentially composed of tips paid by those customers. Thus, although they sometimes received a low fixed salary, in most cases those employees had no guaranteed income, especially in the restaurant and hairdressing sectors. In those circumstances, the French authorities regarded it as essential to ensure that, where the tips were not paid to them direct, such employees actually received the whole of the sums paid for their benefit to the employer.

25 Consequently, it was in order to protect the interests of employees that the ministerial decision of 8 August 1923, as amended by a circular of 12 March 1928, was adopted. Under those provisions, suppliers who undertook to pass on to their employees the whole of any sums received from customers were exempted from tax, in order to ensure that they did not deduct from the tips collected by them the element corresponding to the tax charge before passing them on to their employees.

26 The French Government states that that administrative concession subsequently formed the subject of a ministerial decision of 29 September 1976, which was confirmed and accompanied by a commentary in the 1976 instruction. The concession in question was made subject to four conditions which made it possible to restrict its application exclusively to situations in which the employer shares out the full amount of any tips received in the form of a service charge between employees having direct contact with customers, and to oppose demands for an extension of the concession presented from time to time by suppliers whose staff do not have direct contact with customers for example, those not offering table service.

27 According to the French Government, it therefore follows that, because of the conditions governing eligibility for the exemption, it is only suppliers employing staff who have direct contact with customers and who are remunerated by the service charge included in the price paid by the customer that is to say, principally, restaurants and hairdressing establishments that in fact qualify for that concession.

28 Second, the French Government denies that retaining for service charges a system of exemption from VAT which is contrary to the Sixth Directive violates the principle of neutrality of VAT by distorting competition between suppliers.

29 It reiterates that the possibility of excluding service charges from the taxable amount for VAT purposes is not a rule but merely an administrative concession which undertakings are free to apply or not. In addition, it contends that the fact that not all suppliers apply that measure does not have an adverse effect on competition. First, not all suppliers wish to apply that concessionary measure and, second, those who do not qualify for it necessarily carry on their activities in different circumstances.

30 The French Government therefore regards the Commission's action as unfounded.

31 In its reply, the Commission maintains in full the claims put forward in its application. It observes, first, that the arguments of the French Government essentially recount the history of the development of the French rules regarding payment of tips, and that they do not contain anything relating to the breach of obligations complained of.

32 It goes on to state that, even if, as the French Government maintains, the rationale for the conditions governing eligibility for exemption from VAT as laid down by the 1976 instruction may be gleaned from an historical perspective, those conditions are irrelevant in the light of the Community requirements concerning VAT. Nor is it possible to accept the French Government's argument that those conditions provide a ground for opposing demands for an extension of the administrative concession in question. The Commission asserts in that regard that, even if the conditions laid down make it possible to limit the scope of the infringement of Community law, they do not eliminate the infringement itself.

33 Lastly, the Commission maintains that the French Government has in fact itself acknowledged that the administrative practice in issue is merely a concession which is contrary to the national legislation transposing the Sixth Directive. Thus, in noting to its satisfaction the Commission's view that Articles 266(1)(a) and 267-I of the Code correctly transpose the Sixth Directive, the French Government is necessarily concluding, in effect, that the concession in question, which is contrary to the terms of the Code, is also contrary to Community law.

34 In its rejoinder, the French Government reiterates that it is necessary to have regard to the historical context in order to comprehend the purpose of the exemption from VAT in respect of service charges, which is to protect the interests of certain employees. It points out that, even today, despite the introduction of a minimum wage, the remuneration of employees having direct contact with customers in the restaurant and hairdressing sectors continues to derive in part from service charges.

35 Consequently, if the administrative concession exempting service charges from VAT were abolished, that might well have the effect of promoting the practice of giving optional tips, which would penalise employees having direct contact with customers, especially in sectors in which it is not obligatory to indicate prices on a service included basis.

36 As regards the exemption per se, the French Government does not deny that, as the Commission argues in its reply, the conditions laid down in the 1976 instruction governing eligibility for the exemption from VAT are irrelevant in the light of the applicable Community requirements. It merely contends that the conditions imposed for granting that exemption operate to reduce its scope.

37 It adds that an investigation into the application of the administrative concession in question, carried out by the Ministry of Economic Affairs, Finance and Industry, has revealed that, in the

restaurant sector, that concession continues to be applied only by a few suppliers, mainly brasseries employing substantial numbers of staff.

Findings of the Court

38 It must be recalled, first of all, that, according to settled case-law, the consideration received or receivable by the supplier for the provision of a service, which constitutes, under Article 11A(1)(a) of the Sixth Directive, the taxable amount arising from that operation, must be capable of being expressed in terms of the consideration actually received for it, which is a subjective value and not a value estimated according to objective criteria (see Case C-258/95 Fillibeck [1997] ECR I-5577, paragraph 13, and the case-law cited therein). According to the same case-law, that consideration must be capable of being expressed in money (see Fillibeck, cited above, paragraph 14, and the case-law cited therein).

39 As the Advocate General states in points 36 and 40 of his Opinion, in establishments covered by the 1976 instruction, the total sum demanded from the customer, or appearing on the bill presented to him, constitutes in its entirety the consideration for the service supplied to him by the service provider. That consideration, which includes the service charge, is by definition expressed in money.

40 Next, it should be noted that the only provision of the Sixth Directive allowing sums to be excluded from the taxable amount for VAT purposes is Article 11A(3). According to that provision, the taxable amount does not include, subject to certain conditions, price reductions by way of discount for early payment, price discounts and rebates, or amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter.

41 It is clear that the system of exemption from VAT allowed by the French tax authorities in the context of an administrative concession which is confirmed by the 1976 instruction, and which derogates from the rules laid down by Articles 2(1) and 11A(1)(a) of the Sixth Directive, does not fall within any of the situations covered by Article 11A(3) of that directive.

42 It follows that the service charge element must be included in the taxable amount for VAT purposes attributable to the service provider concerned, and that there are no circumstances in which a supplier may be permitted to exclude such charges from his taxable amount for VAT purposes.

43 In that regard, the conditions imposed by the French tax authorities governing eligibility for exemption from VAT are irrelevant. It is immaterial, for the purposes of applying VAT, whether customers have been informed of the existence of the service charge and its percentage, whether sums paid in that respect are shared out in full between staff members having direct contact with the customers, whether those payments are specified in a special register initialled in the margin by each recipient or whether or not the employer indicates on the annual wages statement the amount of the remuneration of that kind received by members of his staff.

44 Consequently, Article 11A(1)(a) of the Sixth Directive precludes application of the method of calculating the taxable amount authorised by the administrative practice confirmed by the 1976 instruction.

45 Furthermore, whilst the foregoing is sufficient for the present action to succeed, it should be recalled that, according to settled case-law, the principle of fiscal neutrality, to which the Commission has also referred, precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned (Gregg, cited above, paragraph 20).

46 It follows that such a principle is infringed where, pursuant to the 1976 instruction, operators offering the same service, for the same total price, may find themselves having to pay different sums in respect of VAT depending on whether or not they indicate on their bills that they are applying a service charge, because the taxable amount differs in each case even though the service provided and the consideration given for it are absolutely identical.

47 Consequently, the administrative concession confirmed by the 1976 instruction violates the principle of fiscal neutrality and gives rise to a distortion of competition.

48 Lastly, the arguments put forward by the French Government in an effort to justify that administrative concession cannot be accepted.

49 Its explanations regarding the historical and political context and the social objective underlying the exemption of service charges from VAT are irrelevant for the purposes of assessing the compatibility of the concession in question with the rules laid down by the Sixth Directive.

50 Similarly, it is necessary to reject the argument purporting to show the limited scope of the exemption from VAT granted in breach of the rules contained in the Sixth Directive.

51 It is settled case-law that an action against a Member State for failure to fulfil its obligations is objective in nature (Case 415/85 Commission v Ireland [1988] ECR 3097, paragraph 9, and Case C-209/89 Commission v Italy [1991] ECR I-1575, paragraph 6). Consequently, where a Member State fails to fulfil its obligations under the Treaty or under secondary legislation, it does so regardless of the frequency or the scale of the circumstances complained of (see, to that effect, Commission v Italy, cited above, paragraph 19, and Case C-105/91 Commission v Greece [1992] ECR I-5871, paragraph 20).

52 It must therefore be held that, by authorising, under certain conditions, the exclusion from the taxable amount for VAT purposes of the compulsory price supplements claimed by certain taxable persons by way of remuneration for the service provided (service charges), the French Republic has failed to fulfil its obligations under Articles 2(1) and 11A(1)(a) of the Sixth Directive.

Decision on costs

Costs

53 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. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by authorising, under certain conditions, the exclusion from the taxable amount for the purposes of value added tax of the compulsory price supplements claimed by certain taxable persons by way of remuneration for the service provided (service charges), the French Republic has failed to fulfil its obligations under Articles 2(1) and 11A(1)(a) 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;

2. Orders the French Republic to pay the costs.