Arrêt de la Cour
Case C-109/02

Commission of the European Communities
v
Federal Republic of Germany

«(Failure of a Member State to fulfil obligations – Sixth VAT Directive – National legislation providing for a reduced rate for musical ensembles and soloists provided the latter organise the concert themselves)»

Judgment of the Court (Fifth Chamber), 23 October 2003 I - 0000
Summary of the Judgment
Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Member States' option to apply a reduced rate to certain supplies of goods and services – Application of a reduced rate to supplies by musical ensembles for a concert organiser and the standard rate to supplies by soloists working for an organiser – Not permissible
*(Council Directive 77/388, Art. 12(3)(a), third subpara.)*By applying a reduced rate of value added tax to services provided directly to the public by musical ensembles or for a concert organiser and to services provided directly to the public by soloists, but applying the standard rate of that tax to the services of soloists working for an organiser, a Member State fails to fulfil its obligations under the third subparagraph of Article 12(3)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes.In exercising the power to charge a lower rate, the Member States must respect the principle of fiscal neutrality which precludes in particular treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subjected to a uniform rate.see paras 19-20, 28, operative part

JUDGMENT OF THE COURT (Fifth Chamber)
23 October 2003 (1)

((Failure of a Member State to fulfil obligations – Sixth VAT Directive – National legislation providing for a reduced rate for musical ensembles and soloists provided the latter organise the concert themselves))

In Case C-109/02,
Commission of the European Communities, represented by E. Traversa and G. Wilms, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and M. Lumma, acting as Agents,

defendant,

APPLICATION for a declaration that, by applying a reduced rate of value added tax to services provided directly to the public by musical ensembles or for a concert organiser and to services provided directly to the public by soloists, but applying the standard rate of that tax to the services of soloists working for an organiser, the Federal Republic of Germany has failed to fulfil its obligations under the third subparagraph of Article 12(3)(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), as amended by Council Directive 1999/49/EC of 25 May 1999 amending, with regard to the level of the standard rate, Directive 77/388 (OJ 1999 L 139, p. 27),

THE COURT (Fifth Chamber),,

composed of: D.A.O. Edward, acting as President of the Fifth Chamber, A. La Pergola and P. Jann (Rapporteur), Judges,
Advocate General: J. Mischo,
Registrar: R. Grass,
having regard to the report of the Judge-Rapporteur,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 22 March 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by applying a reduced rate of valued added tax (VAT) to services provided directly to the public by musical ensembles or for a concert organiser and to services provided directly to the public by soloists, but applying the standard rate of that tax to the services of soloists working for an organiser, the Federal Republic of Germany has failed to fulfil its obligations under the third subparagraph of Article 12(3)(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), as amended by Council Directive 1999/49/EC of 25 May 1999 amending, with regard to the level of the standard rate, Directive 77/388 (OJ 1999 L 139, p. 27, the Sixth Directive).

Legal background

Community rules

2 According to Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is to be subject to value added tax.

3 Article 12(3)(a) of the Sixth Directive provides that: The standard rate of value added tax shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. From 1 January 1999 until 31 December 2000, this percentage may not be less than 15%....Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable

amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.

4 The seventh category of Annex H to the Sixth Directive refers to admissions to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and to reception of broadcasting services. The eighth category includes services supplied by or royalties due to writers, composers and performing artists.

National rules

5 Point 7(a) of Paragraph 12(2) of the Umsatzsteuergesetz 1999 (German law on turnover tax 1999, BGBl. I, p. 1270) provides for the application of a reduced rate of VAT of 7% on services provided by theatres, orchestras, chamber music ensembles, choirs and museums and on the organisation of theatrical performances and concerts by other entrepreneurs.

6 It is apparent from the file that, according to the case-law of the Bundesfinanzhof (Federal Finance Court) (Germany), the application of that reduced rate is only accorded to soloists if they organise the concert themselves. By contrast, services provided by soloists to a concert organiser are subject to the standard rate of VAT.

Pre-litigation procedure

7 By a letter of formal notice of 4 May 1999, the Commission notified the Federal Republic of Germany that it considered that the case-law referred to in the preceding paragraph led to an infringement of Community law, in particular of the third subparagraph of Article 12(3)(a) of the Sixth Directive, in so far as there is no legal basis for treating musical ensembles and soloists who work for a concert organiser differently.

8 As the Commission did not receive a reply to that letter, it sent the Federal Republic of Germany a reasoned opinion in a letter of 24 January 2000, in which it repeated its complaints and requested that Member State to adopt the measures necessary to remedy the situation.

9 In a letter of 5 April 2000, the Federal Republic of Germany replied to the Commission's complaints, setting out the reasons why, in its view, that difference in treatment was necessary.

10 The Commission was not satisfied with that reply and decided to bring the present action.

Substance

Arguments of the parties

11 The Commission considers the failure to fulfil obligations to be made out. In its view, the principle of fiscal neutrality precludes similar goods or supplies of services, which compete with each other, from being treated differently for VAT purposes. That principle also applies to the imposition of a reduced rate by comparison with the standard rate.

12 Similarly, the principle of objectivity requires that one and the same rule be applied to taxable transactions of the same nature. There is a presumption of similarity where the transactions in question are variants of one and the same taxable transaction included in one of the categories of Annex H to the Sixth Directive, such as services provided by ... performing artists within the eighth category of that annex.

13 That term clearly covers both soloists and musical ensembles. Therefore a uniform rate should be applied to them.

14 The German Government contends that the Court should dismiss the action as unfounded. It submits, first, that the fact of being included together in the wording of a category of Annex H to the Sixth Directive does not necessarily establish that the transactions in question are similar. In the German language version of that annex, the expression Werke ... von ... ausübenden Künstlern uses the indefinite article for the noun corresponding to performing artists, which suggests that the Member States may restrict the application of the reduced rate to only some of the services concerned. The services referred to in the eighth category of Annex H to the Sixth Directive do not necessarily have to be subject to VAT under identical conditions since the Member States have a discretion

in that regard.

15 In any event, there is no similarity between the services in question. Musical ensembles are distinguishable from soloists according to objective criteria, namely on the basis of the number of people. That fact determines the content and structure of the music played.

16 Second, the German Government submits that the national rules in question are not based on the eighth category of Annex H to the Sixth Directive, as the Commission states, but on the seventh category which refers only to concerts and not to the services of a soloist. There is therefore no breach of the principles of fiscal neutrality and objectivity, since the difference in treatment of the services of soloists already results from the Sixth Directive itself, from the combined effect of the seventh and eighth categories of Annex H.

17 Third, those provisions are in fact intended to benefit the spectator. Such a benefit is also ensured if the soloist himself does not qualify for the reduced rate. Since, under the VAT system, it is the tax rate levied at the final stage which determines the amount of taxation, given the concert organiser's entitlement to a reduction, it makes no difference to the public whether the soloist's services are subject to the standard or reduced rate.

18 Fourth, the German Government submits that the Commission has infringed the principle of *nemini licet venire contra factum proprium* (estoppel) in that on 13 November 1997 it issued a report (COM (97) 559 final) in which it stated that one of the major problems encountered in the application of the reduced VAT rate is the optional nature of Annex H to the Sixth Directive and the lack of common definitions for the categories therein. The Commission is therefore estopped from alleging a failure on the part of the Member States to fulfil obligations where it considers there to be no coherent and conclusive approach in the legislation on that point.

Findings of the Court

19 As regards the German Government's first plea in defence, it should be noted that the third subparagraph of Article 12(3)(a) of the Sixth Directive permits the Member States to apply a reduced rate of VAT to certain goods and supplies of services referred to in Annex H to that directive. The decision whether to exercise that right therefore lies within the Member States' competence.

20 None the less, in exercising that power, the Member States must respect the principle of fiscal neutrality. As is apparent from the Court's case-law, that principle precludes in particular treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subjected to a uniform rate (see Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 36).

21 The German language version of the wording of the eighth category of Annex H to the Sixth Directive which, in common with most of the other language versions, uses the indefinite article for the noun corresponding to performing artists does not undermine that finding in so far as it is a linguistic nuance which, even in the German language, cannot be interpreted to mean that the national legislature has the option whether or not to draw distinctions between the persons thus covered and freely to impose restrictions as to those whose services are subject to a reduced rate.

22 Furthermore, there is nothing to suggest that the services of soloists and musical ensembles are not similar, at least, within the meaning of the case-law referred to at paragraph 20 of the present judgment, if not identical.

23 The term performing artists in the usual sense of that term covers both soloists and musical ensembles alike. The number of people on stage can have no bearing in that regard. The argument that it is on the basis of that number that the content and structure of the music played must be determined is also irrelevant for tax purposes. It is also contradicted by the German Government itself when it submits that the reduced rate does apply to performances organised by soloists themselves and that it is only when an otherwise identical performance is organised by a person other than the soloist that the soloist's services are taxed at the standard rate.

24 It follows that the first plea in defence must be rejected.
25 As regards the German Government's second plea in defence that, first, the national rules in question are not based on the eighth category of Annex H to the Sixth Directive but on the seventh category thereof and, second, that the combination of those two categories permits soloists to be treated differently from musical ensembles, it suffices to state that neither that seventh category which refers without distinction to concerts, nor the eighth category, read separately or together, makes such a distinction. Moreover, that seventh category refers to admissions to performances such as concerts but not to the services of musical performing artists themselves which, alone, are the subject-matter of the Commission's complaint in these proceedings. That plea in defence is therefore irrelevant and must be rejected.
26 As regards the third plea in defence, based on the right of concert organisers to deduct, it also suffices to state that the present proceedings do not concern that right, but rather the rate applicable to the services of musical performing artists. That plea is therefore also irrelevant and must be rejected.
27 As regards the German Government's fourth plea in defence, that the Commission should not have brought infringement proceedings in respect of a provision which it regards itself as incoherent and inconclusive, it need merely be pointed out that, whatever the Commission's assessment of the problems associated with the application of Annex H to the Sixth Directive in the past, that cannot affect the merits of an infringement action based on a clear difference in the treatment of two similar services. That plea in defence must therefore also be rejected.
28 In the light of the foregoing, it must be held that, by applying a reduced rate of VAT to services provided directly to the public by musical ensembles or for a concert organiser and to services provided directly to the public by soloists, but applying the standard rate of that tax to the services of soloists working for an organiser, the Federal Republic of Germany has failed to fulfil its obligations under the third subparagraph of Article 12(3)(a) of the Sixth Directive.

Costs
29 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 so applied and the Federal Republic of Germany has failed in its pleas, the latter must be ordered to pay the costs.
On those grounds,

THE COURT (Fifth Chamber)

hereby:
1. Declares that, by applying a reduced rate of value added tax to services provided directly to the public by musical ensembles or for a concert organiser and to services provided directly to the public by soloists, but applying the standard rate of that tax to the services of soloists working for an organiser, the Federal Republic of Germany has failed to fulfil its obligations under the third subparagraph of Article 12(3)(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, as amended by Council Directive 1999/49/EC of 25 May 1999 amending, with regard to the level of the standard rate, Directive 77/388;
2. Orders the Federal Republic of Germany to pay the costs.
Edward

La Pergola

Jann

Delivered in open court in Luxembourg on 23 October 2003.
R. Grass

V. Skouris

Registrar

President

1 – Language of the case: German.