

## 61996C0060

Opinion of Mr Advocate General Cosmas delivered on 20 March 1997. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - VAT - Sixth Directive - Exemptions - Letting of tents, caravans or mobile homes. - Case C-60/96.

*European Court reports 1997 Page I-03827*

### Opinion of the Advocate-General

*1 This case concerns an action brought by the Commission under Article 169 of the Treaty against the French Republic for failure to fulfil its obligations under Article 2 of the Sixth VAT Directive (1) in respect of the tax treatment of the letting of tents, caravans or mobile homes.*

#### *I - The Sixth Directive*

*2 Article 2(1) of the Sixth Directive provides that 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 VAT.*

*3 Title X concerns exemptions for certain activities. Section B of Article 13, which is entitled 'Exemptions within the territory of the country', provides as follows:*

#### *'B. Other exemptions*

*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:*

*(a) [...]*

*(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. [...]*

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

*... '. (2)*

## *II - The national legislation at issue*

*4 In France the supply of services for consideration by a taxable person acting as such is subject to VAT by virtue of Article 256 of the Code Général des Impôts (General Tax Code; hereinafter 'the Code').*

*5 For present purposes, Article 261-D of the Code is worded as follows:*

*'The following are exempted from value added tax:*

*[...]*

*4° The occasional, permanent or seasonal letting of accommodation which is furnished or fitted for residential use.*

*However, the exemption does not apply to:*

*[...]*

*(b) The provision of furnished or fitted premises where the operator supplies - in addition to overnight accommodation - breakfast, the daily cleaning of the premises, the supply of household linen and reception facilities for clients, and is entered on the commercial and company register as engaging in such activity;*

*...'*

*6 According to an administrative circular of 11 April 1991, issued by the French fiscal legislation department, (3) concerning the scope of VAT, exemptions therefrom and the letting of accommodation furnished or fitted for residential use:*

*'[C]aravans, tents, mobile homes and light-framed leisure dwellings which are genuine fixed installations, specially adapted for residence and used exclusively as living quarters, must also be regarded as residential premises, whereas the letting by the hour, day, week or month of touring caravans, camper vans, barges, boats and so on must be regarded as the letting of corporeal movable property which is compulsorily subject to VAT ... '.*

*7 In the Commission's view, by exempting from VAT the letting of certain forms of movable property (tents, caravans, mobile homes and light-framed leisure dwellings), the French legislation infringed Article 2 of the Sixth Directive in that it went beyond the scope of the exemption provided for in Article 13B(b) of that Directive, which applies solely to the letting of immovable property. Accordingly, on 23 April 1993, the Commission sent the French Government a letter of formal notice granting it two months in which to submit its comments.*

*8 The French Government denied the Commission's charges. (4) Specifically, it maintained that, in certain circumstances, the provision of caravans and mobile homes cannot be assimilated to the letting of movable property since they constitute genuine fixed installations with no permanent means of locomotion, within the meaning of the criteria laid down by the French Conseil d'État. Furthermore, the national legislation at issue prevented any distortion of competition as a result of applying a different tax treatment to persons letting caravans and mobile homes, on the one hand, and persons letting immovable property, which is exempt from VAT, on the other.*

*9 Unconvinced by the French Government's arguments, the Commission sent it a reasoned opinion on 8 November 1994 further explaining the reasons why it considered the French legislation to be contrary to Article 2 of the Sixth Directive, and calling on the French Government to take the necessary measures to comply with the opinion within two months of the date of its*

notification.

10 In its reply to the reasoned opinion, following an experts' report on the letting of tents, caravans and mobile homes for residential use, the French Government concurred with the Commission's position. (5) It also undertook to rescind the contested administrative circular of 11 April 1991 and to lay down detailed rules for the levying of VAT on such lettings. Lastly, it stated that the measures taken following consultations with the operators concerned would be communicated to the Commission as soon as possible.

11 Article 39 of the Finance Law (Amending Act) 1995 (Law No 95-1347 of 30 December 1995) (6) inserted a third subparagraph in Article 279(a) of the Code providing for a reduced rate (5.5%) of VAT to be applied to services relating to 'the supply of accommodation on graded camping sites, where the operator of the site issues a bill ... provides reception facilities and allocates 1.5% of his net total turnover to publicity, or, where overnight accommodation is arranged by a third party, if the latter allocates 1.5% of his total turnover in France to publicity'. That new provision is to apply to transactions in respect of which the chargeable event occurred on or after 1 January 1996. (7)

12 The Commission maintains that it received no official notification that the French legislation at issue had been amended. However, it was informed that the French authorities were continuing to give effect to the circular of 11 April 1991, on the basis of which taxable persons supplying the services concerned had been issued with revised VAT assessments. Consequently, taking the view that the letting of tents, caravans or mobile homes must be subject to VAT, the Commission brought an action against the French Republic on 5 March 1996 for failure to fulfil its obligations.

13 The French Government states that on 10 April 1996 it sent to the office of the French Permanent Representative to the European Communities, for onward communication to the Commission, written notification of the legislative amendments indicating that the new provisions would enter into force on 1 January 1996, the date on which the provisions of the administrative circular in question ceased to have effect.

14 Moreover, a circular of 18 July 1996 entitled 'Reduced rate applicable to the supply of accommodation on camping sites', drafted by the fiscal legislation department of the French Ministry of Economic and Financial Affairs, further established that the provision of tents, caravans, mobile homes and light-framed leisure dwellings on registered camping sites would thenceforth be subject to VAT at the normal rate, although it could be subject to a reduced rate on certain conditions set out in that circular. (8)

### *III - Form of order sought by the Commission*

15 In its application, the Commission claims that the Court should:

(a) declare that, by introducing and maintaining in force an administrative provision extending to the letting of certain forms of movable property the exemption from VAT which is restricted by Community law exclusively to the letting of immovable property, the French Republic has failed to fulfil its obligations under Article 2 of Council Directive 77/388/EEC of 17 May 1977 (Sixth VAT Directive);

(b) order the French Republic to pay the costs.

### *IV - Findings*

16 It is clear from the documents before the Court that both Law No 95-1347 of 30 December 1995 and the new circular of 18 July 1996 post-date the expiry of the two-month period granted to the French Republic in the reasoned opinion. (9)

17 It is settled law that 'the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes'. (10)

18 In the light of the Court's approach, it seems to me that the legislative amendment introduced after the expiry of the time-limit set by the Commission in its reasoned opinion cannot be taken into account. In other words, the question whether the French Republic failed to fulfil its obligations under Article 2 of the Sixth Directive must be considered on the basis of the national legislation in force at the time when the period prescribed in the reasoned opinion expired.

19 In its reply to the reasoned opinion, the French Government expressly stated that, after arranging for an experts' report to be drawn up on the letting of tents, caravans and mobile homes for residential use, it concurred with the Commission's point of view. It also undertook in its reply to adopt the measures necessary to comply with the reasoned opinion and to inform the Commission thereof. At the hearing, the French Government's representative expressly acknowledged once again that the French Republic continued to fall short of its obligations after the expiry of the time-limit set by the reasoned opinion. Accordingly, since the French Republic has not adopted the measures in question within the period prescribed, it has failed, in my view, to fulfil its obligations under Article 2 of the Sixth Directive. (11)

20 Consequently, there is no need to consider to what extent, by adopting Law No 95-1347 and the new administrative circular of 18 July 1996 - both of which post-date the expiry of the period prescribed - the French Republic fulfilled its obligations under Article 2 of the Sixth Directive with respect to the levying of VAT on the letting of tents, caravans and mobile homes; nor is there any need to consider to what extent the contested circular of 11 April 1991 continued to be applied even after the adoption of the new Law, in breach of the obligations laid down in Article 2.

## V - Conclusion

21 On those grounds, I propose that the Court:

(1) declare that, by maintaining in force an administrative provision extending to the letting of certain forms of movable property the exemption from VAT which Community law restricts exclusively to the letting of immovable property, and by not complying with the Commission's reasoned opinion within the prescribed period, the French Republic has failed to fulfil its obligations under Article 2 of the Sixth 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;

(2) order the French Republic to pay the costs.

(1) - 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).

(2) - The last subparagraph of Article 4(3)(a) of the Sixth Directive states that 'a building', as used in the directive, shall be taken to mean 'any structure fixed to or in the ground'.

(3) - *Administrative circular of 11 April 1991 (BOI 3 A-9-91 and DB 3 A 317, as updated on 1 May 1992).*

(4) - *Reply communicated by written memorandum sent to the Commission on 22 June 1993 by France's Permanent Representative to the European Union.*

(5) - *Reply communicated by written memorandum sent to the Commission on 9 January 1995 by France's Permanent Representative to the European Union.*

(6) - *Finance Law (Amending Act) 1995, published in the Journal Officiel de la République Française of 31 December 1995, p. 19078.*

(7) - *According to the French Government, by making such services subject to a reduced rate of VAT, it availed itself of the option open to Member States under Article 12(3)(a) of the Sixth Directive, which permits the Member States to apply either one or two reduced rates. The reduced rates may not be less than 5% of the tax base and are only to apply to supplies of the categories of goods and services specified in Annex H. [The provision in question is Article 12(3), as subsequently amended by Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388 (approximation of VAT rates) (OJ 1992 L 316, p. 1) and by Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388 and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47). Furthermore, Article 4(1), second subparagraph, of Directive 92/111 provides that the Member States are to adopt the necessary measures to adapt their VAT system to the provisions of that directive, so that the adapted systems enter into force on 1 January 1993, and that they are to inform the Commission accordingly.] Annex H to the Sixth Directive includes in the 'list of supplies of goods and services which may be subject to reduced rates of VAT' accommodation provided by hotels and similar establishments including the provision of holiday accommodation and the letting of camping sites and caravan parks (point 11). [Annex H was incorporated in the Sixth Directive by Directive 92/77 (Article 1(5)).]*

(8) - *That circular was published in the Bulletin Officiel des Impôts of the French Ministry of Economic and Financial Affairs (Code 3 C-4-96) No 142 of 26 July 1996, 3 C.A./22-C 223.*

(9) - *The Commission's reasoned opinion is dated 8 November 1994 and the letter of France's Permanent Representative forwarding the French Government's reply to the Commission is dated 9 January 1995. However, the memorandum containing the French Government's reply bears no date.*

(10) - *See in particular Case C-302/95 Commission v Italy [1996] ECR I-6765, paragraph 13, and Case C-289/94 Commission v Italy [1996] ECR I-4405, paragraph 20.*

(11) - *For guidance, see paragraphs 13 and 20, respectively, of the judgments in Cases C-302/95 and C-289/94, cited in footnote 10 above.*