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Opinion of Mr Advocate General Jacobs delivered on 23 November 2000. - Commission of the European Communities v Portuguese Republic. - Failure of Member State to fulfil its obligations - Sixth VAT Directive - Articles 12 and 28(2) - Reduced rate. - Case C-276/98.

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Opinion of the Advocate-General

1. In these proceedings brought pursuant to Article 169 of the EC Treaty (now Article 226 EC), the Commission seeks a declaration that by introducing or maintaining in force a reduced rate of 5% applicable to the products listed in points 1.8, 2.11, 2.19 and 3.8 of List I annexed to the Portuguese VAT Code, including respectively wine, machinery and equipment for alternative energy research, tolls charged on passage of the road bridge over the Tagus and, finally, agricultural tools and equipment, the Portuguese Republic has infringed Articles 12 and 28(2) of the Sixth VAT Directive (hereinafter the Sixth Directive) as amended by Directive 92/77.

The relevant legislative provisions

Community provisions

2. Under Article 2 of the Sixth Directive, a supply of goods or services effected for consideration by a taxable person acting as such is to be subject to VAT. According to Article 4(1), a taxable person is a person who carries out an economic activity, whatever the purpose or result of that activity. Economic activities include, under Article 4(2), the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis. The first subparagraph of Article 6(1) defines a supply of services as any transaction which does not constitute a supply of goods.

3. Article 12(3)(a) of the Sixth Directive, as amended by Directive 92/77, lays down the general rule that:

From 1 January 1993 Member States shall apply a standard rate which, until 31 December 1996, may not be less than 15%.

...

Member States may also apply either one or two reduced rates. The reduced rates may not be less than 5% and shall only apply to supplies of the categories of goods and services specified in Annex H.

4. By way of exception, Article 28(2) of the Sixth Directive, again as amended by Directive 92/77, provides that:

Notwithstanding Article 12(3), the following provisions shall apply during the transitional period referred to in Article 28 I.

...

(e) Member States which at 1 January 1991 applied a reduced rate to supplies of goods and services other than those specified in Annex H may apply the reduced rate or one of the two reduced rates provided for in Article 12(3) to such supplies, provided that the rate is not lower than 12%.

5. Article 4(5) of the Sixth Directive contains rules on goods and services provided by public authorities. It reads as follows:

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.

National provisions

6. Under Article 18(1) of the Portuguese VAT Code, as approved by Decree No 394-B/84 of 26 December 1984 and amended by Law No 2/92 of 9 March 1992 and Law No 39-B/94 of 27 December 1994, the imports, transfers of goods, and supplies of services mentioned in List I, annexed to this legislative text, are subject to a VAT of 5%.

7. List I of the Portuguese VAT Code includes the following items of relevance for these proceedings:

1.8 Regular wine.

...

2.11 Appliances, machinery and other equipment designed exclusively or mainly for the following purposes:

(a) Collection and use of solar energy, wind energy, or geothermal energy;

(b) Collection and use of other forms of alternative energy;

(c) Production of energy by the incineration or modification of detritus, garbage, and other waste;

(d) Exploration of and search for oil and/or development of the discovery of oil and natural gas;

(e) Avoidance or reduction, by measuring and controls, of any form of pollution.

...

2.19 Tolls charged on passage of the Tagus Bridge in Lisbon.

...

3.8 Agricultural tools and utensils, mobile silos, garden tractors, power pumps, electric pumps, tractors, and other machinery and equipment designed exclusively or mainly for the purpose of agriculture, stockrearing, or forestry.

8. None of the goods or services listed in points 1.8, 2.11, 2.19, or 3.8 fall within the transactions specified in Annex H of the Sixth Directive.

Procedure

9. Taking the view that points 1.8, 2.11, 2.19 and 3.8 of List I, combined with Article 18(1) of the Portuguese VAT Code, were contrary to the Sixth Directive, the Commission sent, on 10 April 1996, a letter of formal notice in which it invited the Portuguese Government to present its observations within a period of two months. The Portuguese Government replied by two letters dated 2 July 1996 and 20 November 1996. In those letters, it informed the Commission of its plans to raise, during the budgetary year of 1997, the rate of VAT to 12% for those transactions which fell outside Annex H of the Sixth Directive and which were at that time subject to a rate of 5%. However, it mentioned that those plans might be difficult to implement owing to the great economic significance for Portuguese society of the rate of VAT and the absence of a stable majority in the Portuguese parliament.

10. Having found the Portuguese replies unsatisfactory, the Commission issued, on 10 June 1997, a reasoned opinion pursuant to Article 169(1) of the EC Treaty (now Article 226(1) EC) calling on Portugal to take the necessary measures to comply within a period of two months. The Portuguese Government replied to that opinion by two letters dated 14 August 1997 and 10 March 1998. In its replies, the Portuguese Government assured the Commission of its intention to seek to increase the rate of VAT in the next budgetary law, but it added that the political situation might impede the adoption of that measure and that the VAT rate applicable to wine was in fact likely to remain unchanged.

11. In the light of those replies, the Commission lodged this application with the Court on 20 July 1998.

Analysis

12. There are two aspects of the Commission's claim, which must be examined separately: the rate of VAT applied to the goods mentioned in points 1.8, 2.11 and 3.8 of List I, and the rate of VAT on the bridge toll mentioned in point 2.19 of List I.

The rate of VAT on certain goods

13. The Commission points out that at 1 January 1991 the transactions listed in points 1.8, 2.11, and 3.8 were subject to a reduced rate of VAT. Portugal is therefore entitled to apply a reduced rate of VAT to those transactions under Article 12(3)(a) and Article 28(2) of the Sixth Directive. However, it follows from those provisions that the reduced rate may not be less than 12%. By applying a rate of only 5%, Portugal has acted contrary to Article 12(3)(a) and Article 28(2) of the

Sixth Directive and failed to fulfil its obligations under the Treaty.

14. The Portuguese Government does not deny that Article 18 of the VAT Code is contrary to the Sixth Directive in so far as it applies a VAT rate of 5% rather than 12% to the transactions in points 1.8, 2.11 and 3.8 of List I. However, it states that it will soon take steps to resolve the problem and that its failure to comply with the Directive is due to the absence of a parliamentary majority in favour of raising the rate of VAT as required by the Sixth Directive.

15. It is settled case-law that the Court of Justice cannot in infringement proceedings take into account action taken by a Member State after the expiry of the time-limit laid down in the reasoned opinion, and that a Member State cannot rely on provisions, practices or circumstances related to its own internal legal order as an excuse for its failure to implement a directive within the prescribed time-limit.

16. The Commission's claim should therefore be upheld in relation to points 1.8, 2.11 and 3.8 of List I.

The rate of VAT on the toll charged on passage of the Tagus Bridge

17. The lawfulness of the rate of VAT applied to the Tagus Bridge toll falls to be considered in the light of Article 4(5) of the Sixth Directive and the recent judgments of the Court of Justice in a group of cases concerning that provision.

18. In those cases, the Court of Justice held that the first subparagraph of Article 4(5) applies to tolls charged on the use of infrastructure installations such as roads and bridges if two conditions are fulfilled. First, the provision of the installation must be an activity carried out by a body governed by public law. Secondly, the body must be acting as a public authority when providing that activity. As regards the first condition, the Court 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. As regards the second condition, the Court held that activities pursued as public authorities are those which are engaged in by bodies governed by public law under the special legal regime which is applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders.

19. At the hearing, the Commission and the Portuguese Government appeared to accept that the body which is responsible for providing access to the Tagus Bridge is a body subject to public law acting in this context as a public authority within the meaning of Article 4(5), but to consider that that provision was an optional exception to the general principle that all supplies of goods and services are subject to VAT.

20. Article 4(5) provides that the bodies to which it applies shall not be considered taxable persons. Contrary to the position taken by the parties at the hearing, that wording clearly indicates that Article 4(5) is a mandatory provision rather than an optional exception. Article 4(5) does not grant the Member States the freedom to choose whether to apply the normal VAT rules to the transactions covered by that provision, to apply one of the reduced rates mentioned in Article 28, or to apply any other rate of VAT. Transactions covered by Article 4(5) are not subject to VAT.

21. The only exception to that rule, apart from the transactions listed in Annex D which are not in point here, is where treatment of the public authority as a non-taxable person would lead to significant distortions of competition. There is however no evidence that the treatment of the body responsible for providing access to the Tagus Bridge as a non-taxable person would entail significant distortions of competition. According to the Portuguese Government's statements at the hearing, there are two road bridges over the river Tagus. The access to both of those bridges is provided by public bodies. The toll and the rate of VAT applied to the toll on the two bridges is the

same. Neither the toll nor the rate of VAT is determined freely by the bodies responsible for providing access. The rate of VAT is determined by law; the toll is determined by the Portuguese Government in the context of a contract which grants the relevant public body a concession to handle, manage, and maintain the Tagus bridge. On the basis of those statements, the correctness of which was not contested by the Commission at the hearing, it appears that there is no significant competition between the bodies responsible for providing access to the two bridges over the Tagus in Lisbon.

22. It follows, in my view, that Point 2.19 of List I, annexed to the Portuguese VAT Code, is contrary to Article 4(5) of the Sixth Directive in so far as it applies a VAT rate of 5% to the tolls charged on passage of the Tagus Bridge.

23. However, it is well established that, in infringement proceedings, the Court cannot find an infringement different from that in respect of which a declaration is sought. In this case, the Commission alleged in its reasoned opinion and in its application that Portugal had failed to fulfil its obligation under the Treaty by charging a lower rate of VAT than what is required by Articles 12 and 28(2) of the Sixth Directive. It did not allege a breach of Article 4(5) of the Sixth Directive.

24. The Commission's claim should therefore, in my opinion, be rejected in relation to point 2.19 of List I.

Costs

25. Under Article 69 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. The Commission has succeeded in most of its claims, and has applied for costs. I therefore consider that Portugal should be ordered to pay the Commission's costs.

Conclusion

26. In the light of the foregoing observations, I am of the opinion that the Court should:

(1) declare that by introducing or maintaining in force a reduced rate of 5% applicable to the products listed in points 1.8, 2.11 and 3.8 of List I annexed to the Portuguese VAT Code, including respectively wine, machinery and equipment for alternative energy research, and agricultural tools and equipment, the Portuguese Republic has infringed Articles 12 and 28(2) 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 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC;

(2) for the rest, dismiss the application;

(3) order the Portuguese Republic to bear the costs.