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Opinion of Mr Advocate General Alber delivered on 28 September 2000. - Commission of the European Communities v Kingdom of Spain. - Failure of a Member State to fulfil its obligations - Article 12(3)(a) of the Sixth VAT Directive - Application of a reduced rate to motorway tolls. - Case C-83/99.

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Opinion of the Advocate-General

I Introduction

1. In these proceedings for failure to fulfil Treaty obligations the Commission claims that the Kingdom of Spain has subjected motorway tolls not to the standard rate of VAT but to a reduced rate thereof.

2. Spain justifies its action on the ground that the provision of road infrastructure by concessionaires constitutes a service which may be equated with the transport of passengers and their accompanying luggage, in respect of which a reduced rate of tax is possible. The tax reduction is also necessary in order to offset distortions of competition caused by the failure of other Member States to subject tolls to VAT.

II Relevant provisions

A Community law

3. The rates applicable as a result of the harmonisation of turnover taxes are listed in Title IX 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 hereinafter the Sixth Directive.

4. In that respect the first subparagraph of Article 12(3)(a) provides as follows:

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 1997 to 31 December 1998, this percentage may not be less than 15.

5. Under the third subparagraph of Article 12(3)(a), the 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.

6. Annex H contains the List of supplies of goods and services which may be subject to reduced rates of VAT.

7. Category 5 of the total of 17 categories refers to Transport of passengers and their accompanying luggage.

B National law

8. Royal Decree No 14-1997 of 29 August 1997 and Law No 9/1998 of 21 April 1998, which amended Law No 37/1992 of 28 December 1992 concerning VAT, provide that a reduced rate of 7% is to be applied to motorway tolls instead of the standard rate of 16%. In order to bring this about, the provision of road infrastructure by concessionaires was equated with the transport of passengers and their accompanying luggage specified in category 5 of Annex H of the Sixth Directive.

III Pre-litigation procedure and forms of order sought

9. By letter of formal notice of 22 December 1997 the Commission informed the Spanish Government of its view that the provisions of the Sixth Directive precluded the application of the reduced rate to the collection of motorway tolls.

10. The Spanish Government put forward its view in a letter of 24 April 1998 to which certain observations of the Minister for Economic and Financial Affairs of 13 April 1998 were attached. Essentially, the following arguments for the application of the reduced rate were set out therein.

11. First, there is between the Member States, some of which collect no VAT, unequal treatment of taxable persons, that is to say the concessionaires as operators of the road infrastructure, as a result of the differential tax treatment of the relevant tolls paid for the use of roads. Spain therefore decided to reduce the rate of tax in order to reduce this imbalance. Furthermore, this action has no effect on the Community's own resources and was thus not at variance with the Sixth Directive.

12. Second, category 5 of Annex H of the Sixth Directive is applicable in the present case. Although it is possible that a strict interpretation of the term transport of passengers and their accompanying luggage does not cover the provision of road infrastructure on payment of a toll, in the present case a logical or teleological interpretation, which is not guided by the wording of the provision alone, must be taken as a basis. Since it is necessary to find a solution which enables the Member States to apply a comparable rate, a broad interpretation must be placed on the term in question. This serves to safeguard the principles of neutrality and non-discrimination in respect of taxation.

13. However, since the Commission still considered that the Sixth Directive had been infringed, it delivered a reasoned opinion pursuant to Article 169 of the EC Treaty (now Article 226 EC) by letter of 10 August 1998. In that opinion it again pointed out to the Spanish Government that the application of a reduced rate constituted a failure to fulfil the obligations under Article 12 of the Sixth Directive and invited it to take appropriate measures within two months of service in order to comply with that opinion.

14. The response from the General Secretary of the Ministry of Economic and Financial Affairs responsible for technical matters of 28 September 1998 essentially reiterated the arguments which had already been put forward.

15. In the light of these submissions by the Spanish authorities, the Commission brought the present proceedings received by the Registry of the Court of Justice on 8 March 1999 since in its view the Kingdom of Spain had failed to comply with the reasoned opinion.

16. It claims that the Court should

(1) declare that, by applying a reduced rate of tax to the supply of services consisting in making road infrastructure available to users, the Kingdom of Spain has failed to fulfil its obligations under Article 12 of the Sixth Council Directive 77/388/EEC of 17 May 1977;

(2) order the Kingdom of Spain to pay the costs.

17. The Kingdom of Spain contends that the Court should

(1) dismiss the action brought by the Commission;

(2) order the Commission to pay the costs.

IV Arguments of the parties

18. The Commission contends that the reduced rate of VAT is applicable only to the services listed in Annex H of the Sixth Directive. It is unable to concur with the broad interpretation which Spain places on the Directive and cannot accept the equation of the provision of infrastructure by concessionaires with the transport of passengers and their accompanying luggage which is allegedly necessary in order to avoid discrimination. Furthermore, the Commission disputes Spain's contention that there is distortion of competition as a result of the differential tax treatment of tolls paid for the use of roads in the individual Member States. Tolls for the use of roads are charged in a total of nine of the 15 Member States. Only four Member States (France, Italy and Portugal in addition to Spain) have a comparable toll road infrastructure in terms of size. In the other Member States tolls are collected only in respect of certain stretches of road or specific bridges or tunnels. Five of these countries including France have not subjected tolls to VAT and therefore proceedings for failure to fulfil Treaty obligations have been instituted against them. The alleged distortion of competition is not as great as Spain claims in order to justify its action.

19. Furthermore, a Member State cannot rely on unlawful acts of other Member States in order to justify its failure to fulfil Treaty obligations.

20. It should also be borne in mind that the claiming of VAT allows users of the infrastructure to avail themselves of a possible tax deduction, and that this system therefore safeguards the neutrality of the tax.

21. The Commission further contends that category 5 of Annex H is not applicable in the present case. As regards the transport of passengers and their accompanying luggage, the taxable persons undertake to transport passengers and goods from one location to another. In the present case, however, the concessionaires are making road infrastructure, that is to say motorways, available to users so that they may move more quickly. Even if a broad interpretation is placed on the term, the two cases are not comparable.

22. *The real reason for the application of a reduced rate lies in the concessionaires' demand for tolls to be reduced or any increase to be avoided.*

23. *As in the pre-litigation procedure, the Spanish Government claimed that there were distortions of competition resulting from the differential tax treatment of motorway tolls in the Member States and referred to category 5 of Annex H of the Sixth Directive to justify its action.*

24. *Even if the service concerned the provision of road infrastructure varies in extent in the individual Member States, this does not justify distortions of competition which place traders at a disadvantage.*

25. *Unequal treatment to the detriment of Spanish motorway operators in the event that the standard rate of VAT were applied is demonstrated by the fact that a large number of users would be unable to claim a deduction of input tax. This would result in the service supplied becoming more expensive, which would have a unfavourable effect on demand, and consequently the differential tax treatment would lead to an imbalance since operators in the other countries would be able to expand their trading volumes.*

26. *Furthermore, the Spanish Government relies on the principle of the protection of legitimate expectations. In 1989 the Commission instituted several sets of proceedings for failure to fulfil Treaty obligations against other Member States who had not subjected such services to the standard rate of VAT. However, up until the end of 1997 these proceedings were not pursued further. Consequently, when the Royal Decree of August 1997 was adopted Spain had no reason to expect that the Commission would nevertheless take further action against the Member States. The staying of the relevant proceedings for failure to fulfil Treaty obligations gave rise to legitimate expectations to the benefit of Spain.*

27. *By its action, that is to say by applying tax at a reduced rate, Spain intended to attain three objectives. First, the action was designed to limit the consequences of the distortion of competition and the unequal treatment of users. Second, it was a provisional measure intended to remain in force until a definitive solution was found at Community level. This was also notified to the Commission as such. Thirdly, a course of action had been chosen which caused no damage to the Community a reduced rate was applied to avoid any impact on the system of the Communities' own resources.*

28. *As regards the applicability of category 5 of Annex H of the Sixth Directive, the Spanish Government contends that it did not interpret this provision too broadly, but merely in the light of the Treaty. The Treaty lays down the principle of the protection of free competition. In view of the situation prior to the introduction of the reduced rate, Spain was not only permitted to reduce the effects distorting competition but was actually required to do so.*

V Opinion

29. *The provision of road infrastructure by concessionaires is a service effected for consideration subject to VAT as provided for in Article 2(1) of the Sixth Directive. The requirement that there must be a direct link between the service and the consideration, that is to say the toll, is fulfilled.*

30. An economic activity within the meaning of Article 4(2) of the Sixth Directive also exists in particular since, according to the case-law of the Court, the scope of the term must be assumed to be very broad without regard to its purpose or results and the service does not have to be primarily or exclusively orientated towards the market or economic life. It is sufficient that it is actually connected with economic life in some way or other, regard being had to the actual economic situation. In the present case road infrastructure is being made available on payment of a toll in accordance with a system of concessions.

31. Since the concessionaires carry out this economic activity independently, they are taxable persons within the meaning of Article 4(1) of the Sixth Directive. They carry out this activity in their own name and not as representative for or on behalf of the State. Therefore, the question whether the activity of providing road infrastructure is an activity carried out in the exercise of public authority, in respect of which the State as the person carrying out the activity is not considered a taxable person pursuant to Article 4(5) of the Sixth Directive, may be left undecided.

32. It follows from all the foregoing that the relevant activity constitutes a service subject to VAT. For a reduced rate to apply, the relevant activity would have to be a service within the meaning of Annex H.

33. However, I am unable to accept the comparison made between the service consisting in making a road infrastructure generally available and the transport of passengers and their accompanying luggage specified in category 5 of Annex H of the Sixth Directive.

34. No Community law definition of this term is to be found in the relevant provisions. Therefore, in order to determine its meaning more precisely it is necessary to examine its context, regard being had to the system of the Sixth Directive.

35. It is clear from the spirit and purpose of the directive, and the wording of Article 2 in particular, that the basic principle of the directive must be construed as being that any supply of goods or services is, if effected for consideration by a taxable person, subject to VAT in full unless it is expressly exempted or a reduced rate is possible. The provisions relating to reduction and exemption must therefore be interpreted strictly, since they constitute an exception to the basic principle of the directive.

36. This means therefore that in the present case the term transport of passengers and their accompanying luggage has to be viewed in light of its usual meaning. Thus not every contract which displays elements of transport in the widest sense can automatically be subsumed to this term. This would result in a broad interpretation of the reduction, which is precisely the opposite of what is intended. Consequently, it is a condition that elements of a contract of carriage are predominant in a contractual agreement between the concessionaires, as the operators of the infrastructure, and the users thereof.

37. However, the provision of road infrastructure on payment of a toll does not satisfy this condition. Although the stretch of road to be travelled on is made available to the user for a specific period (travelling time) for consideration, elements of a contract of carriage are not predominant in this respect, since the user is merely interested in covering a specific stretch of road as quickly and safely as possible. However, the concessionaires are precisely not contractually bound to effect any transport. That remains a matter for the relevant users, who use the toll motorways merely to move from one point to another and to reach their destination more quickly and conveniently.

38. *The need for a strict interpretation is also apparent from a comparison of the other 16 categories specified in Annex H (see footnote 4 above), which concern predominantly supplies and services of a social or cultural nature or relate to public services.*

39. *Equating the provision of transport infrastructure for quicker and safer movement and general mobility with the transport of passengers and luggage would extend the scope of Annex H and therefore constitute a derogation from the basic rule of full taxation contrary to the spirit and purpose of the directive.*

40. *Consequently, there is no real need to examine further the other arguments for a reduction and grounds of justification put forward by Spain. Moreover, they do stand up to scrutiny either.*

41. *The Spanish Government justifies the application of the reduced rate on the ground that distortions of competition allegedly exist as a result of the differential tax treatment of tolls in the other Member States.*

42. *First, it must be noted that there is no competition between the Spanish motorway operators and those of other Member States in which tolls are, wrongly, not subjected to VAT. On account of the geographic situation no Spanish driver would switch to a possibly cheaper French motorway. The fact that the profit situation of the Spanish concessionaires is possibly less favourable is a separate issue.*

43. *A distortion of competition in this specific case would arise only if, for example, non-taxable State bodies were competing for the supply of the same services with a taxable private person and were therefore able to offer their services at a lower price because of the tax exemption. However, the Spanish Government has put forward no factual evidence to show that any such competitive situation exists.*

44. *Furthermore, the other arguments advanced by the Kingdom of Spain in respect of distortions of competition do not stand up to scrutiny. First, the scope of the Directive as is clear from a number of provisions is limited to transactions within the country. There is at any rate no breach visible of the duty to treat other nationals equally in the present case. Second, the cases of distortion mentioned no right to deduct input tax on the one hand and reduced costs on the other are not the result of waiving tax in other countries or charging tax in Spain as the case may be, but of the misapplication of the law by other Member States. Following clarification by the Court, the Member States in which there is a toll road infrastructure will certainly levy VAT in a uniform manner.*

45. *Even where differences regarding the application of VAT to motorway tolls undoubtedly exist between the Member States, since in certain Member States the standard rate is applied and in others no VAT is levied, it is not for the Member States to even out such differences by means of unilateral measures.*

46. *The purpose of the Sixth Directive is to harmonise the laws of the Member States relating to turnover taxes. The aim in particular is thus to ensure according to the ninth recital in the preamble that the application of the Community rate to taxable transactions leads to comparable results in all the Member States. Consequently, it is evident as a whole from the harmonised VAT system that the Member States have a margin of discretion only where the relevant provisions of Community law specifically so provide.*

47. *But if all Member States are obliged to apply the standard rate of VAT to a service such as the provision of road infrastructure by concessionaires, a Member State is barred under the Sixth Directive from following the unlawful example of others in order to eliminate differences regarding taxation. The other Member States precisely are required, for their part, to apply the rate laid down*

by the Sixth Directive.

48. According to the constant case-law of the Court, a Member State cannot successfully rely on the fact that other Member States have likewise failed to fulfil their obligations.

49. In that respect the Spanish Government may likewise not rely on an infringement of tax neutrality to justify its conduct, particularly since no infringement has taken place, or rely on the principle of the protection of legitimate expectations. First, the Commission conducted the proceedings for failure to fulfil Treaty obligations brought against Spain swiftly in under 15 months (see paragraphs 9 to 15 above), and second, the unlawful conduct of other Member States cannot create effective legitimate expectations which would justify one's own failures. The admittedly inexplicably long period of many years between the initiation of proceedings for failure to fulfil Treaty obligations and the bringing of the actions in the five cases referred to above (see paragraph 26 and footnote 5 in respect of paragraph 17 above) could have effects at most if additional retrospective payments were requested, which, however, is not so in the present case.

50. The other argument advanced by the Spanish Government that the relevant Spanish provisions were merely interim measures which, moreover, had no (unfavourable) impact on the system of the Communities' own resources, is also immaterial, since the standard rate should have been applied to the service in question.

51. Consequently, the argument put forward by the Spanish Government regarding the elimination of distortions of competition must be rejected in its entirety.

52. To sum up, the Court should declare that, by applying a reduced rate to the provision of services consisting in making road infrastructure available, the Kingdom of Spain has failed to fulfil its obligations under the Sixth Directive.

VI 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 asked for the Kingdom of Spain to be ordered to pay the costs and the latter has been unsuccessful in its pleadings, it must be ordered to pay the costs.

VII Conclusion

54. For the foregoing reasons I therefore propose that the Court should rule as follows:

(1) By applying a reduced rate to the provision of services consisting in making road infrastructure available to users by concessionaires, the Kingdom of Spain has failed to fulfil its obligations under Article 12 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) The Kingdom of Spain shall bear the costs of the proceedings.