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Opinion of Mr Advocate General Tesauro delivered on 7 May 1991. - Commission of the European Communities v Kingdom of Spain. - VAT - Directive 77/388/EEC - National law not complying therewith. - Case C-35/90.

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Opinion of the Advocate-General

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Mr President,

Members of the Court,

1. This application is for a declaration that, by exempting from value added tax the professional services, including those whose consideration consists in copyright, provided by figurative artists, writers, literary contributors, newspaper and magazine illustrators and photographers, musical composers, playwrights and persons responsible for the plot, adaptation, script or dialogue of audio-visual works, the Kingdom of Spain has infringed Article 2(1) of the Sixth Council Directive (No 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 (Official Journal 1977 L 145, p. 1, hereinafter referred to as "the directive") and has therefore failed to fulfil its obligations under the Treaty.

2. I shall remind you briefly of certain circumstances in the present case which are important for what I have to say and as regards the rest refer to the Report for the Hearing.

Article 7(2) of the Spanish Law No 30 of 2 August 1985 which introduced the scheme of value added tax made the aforementioned professional services liable to VAT at the reduced rate of 6%.

However, two years later a law on intellectual property (Law No 22 of 11 November 1987) exempted those services from VAT.

That exemption, which the Commission considers to be contrary to the principle in Article 2(1) of the directive that VAT should have general application, is the subject of the present action.

3. The Spanish Government considers that the exemption in question is justified by the derogation referred to in Article 28(3)(b) of the directive.

Article 28(3)(b) provides that during the transitional period (which was to have ended on 1 January 1983 but was subsequently extended) Member States may "continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned". Services eligible for

exemption under Annex F include services supplied by "authors, artists, performers".

In the Spanish Government's opinion that provision allows all Member States, including those who joined the Community subsequently, to maintain for the transitional period referred to in Article 28(4) the exemptions applicable when the Sixth Directive entered into force.

Since the Spanish scheme which obtained prior to VAT did not tax the services which are the subject of the present proceedings, it follows, in the Government's view, that Spain is authorized to apply to them a transitional scheme of exemption in accordance with Article 28.

4. The Commission rejects that view for two reasons. In the first place, it considers that in view of the derogating nature of the rule, in the absence of a specific provision in the Act of Accession, Article 28(3) cannot apply to States which joined the Community subsequently. In its view, that is confirmed a contrario by the fact that in the case of Portugal the right to exempt from VAT certain transactions referred to in Article 28(3)(b) is expressly mentioned in the Act of Accession. On the other hand, the Act of Accession of Spain contains no reference to the provision in question so that the possibility of relying on Article 28(3)(b) for the purposes of justifying the exemptions in question must be regarded as excluded.

In the second place the Commission argues that even assuming that Spain may rely on the derogation in question, in any event the exemption which is the subject of the present proceedings falls outside the scope of that provision and is not justified by it. According to the Commission, the provision, as is clearly apparent from its terms, allows a Member State only to "continue to exempt" specific activities. It thus allows only an existing exemption to be continued, but once VAT has been applied to specific services it prohibits their being subsequently granted exemption. In the present case it is common ground that in Spain the activities in question were subjected to the general scheme of VAT pursuant to the Sixth Directive by Law No 30 of 2 August 1985 until the entry into force of Law No 22 of 11 November 1987, that is, for more than two years. The exemption provided for by the aforementioned 1987 law thus obviously constitutes a new exemption which is quite unjustified by Article 28(3)(b).

5. Let me say straightaway that of those two arguments put forward by the Commission the second seems to me decisive.

The wording of the provision is extremely clear. It allows a Member State only to continue to exempt specific activities "under conditions existing in the Member State concerned". Conversely, that provision does not allow exemption to be granted simply to any transaction which was not subject to tax prior to the entry into force of the directive. In other words, once a Member State, like Spain in the present case, in implementation of the directive has subjected specific activities to VAT it can no longer subsequently rely on Article 28(3)(b) to grant them exemption from VAT and from the general scheme of liability. Furthermore, to give States such a power, apart from the fact that it is quite excluded by the clear terms of the provision in question, would be contrary to the principles of general application and neutrality in respect of the tax which are implied in the directive and which, as the Commission rightly pointed out, are an essential key in interpreting derogating provisions.

In addition, the interpretation which I propose seems to be in line with that sanctioned by the Court in its judgment in Case 73/85 Kerrutt v Finanzamt Muenchengladbach-Mitte [1986] ECR 2219 where it was stated that the wording of the provision in question precludes "the introduction of new exemptions or the extension of the scope of existing exemptions after the date of entry into force of the directive".

6. In view of those observations, I think it is possible to grant the present application without it being necessary to go further into the other argument put forward by the Commission that since the Act of Accession is silent on the subject, Spain may not rely on Article 28(3)(b). Moreover, that

argument does not seem to be convincing since in the absence of specific limits or reservations the State which joins accepts all the rights and obligations resulting from the acquis communautaire which as regards the Sixth Directive necessarily includes the provisions of Article 28.

7. I therefore propose that the Court grant the application and order the defendant to pay the costs.

() Original language: Italian.*