JUDGMENT OF THE COURT (Fifth Chamber)
23 May 1996 *

In Case C-331/94,

Commission of the European Communities, represented by Dimitrios Gouloussis, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Panagiotis Mylonopoulos, Legal Assistant in the Special Community Legal Affairs Department of the Ministry of Foreign Affairs, and Anna Rokofyllou, adviser to the minister responsible for Foreign Affairs, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte Croix,

defendant,

APPLICATION for a declaration that, by exempting certain transport services from value added tax and by charging that tax on certain services supplied by tour operators, the Hellenic Republic has failed to fulfil its obligations under Articles 2, 9(2)(b) and 26 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 (OJ 1977 L 145, p. 1),

* Language of the case: Greek.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón and M. Wathelet, Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 February 1996, at which the Hellenic Republic was represented by Ioanna Galani-Maragkoudaki, Deputy Special Legal Adviser in the Special Community Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, and by Anna Rokofyllou, and the Commission by Dimitrios Gouloussis,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 December 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by exempting certain transport services from value added tax (VAT) and by charging that tax on certain services supplied by tour operators, the Hellenic Republic has failed to fulfil its obligations under Articles 2, 9(2)(b) and 26 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 (OJ 1977 L 145, p. 1, 'the Sixth Directive').

2 By letter of formal notice of 31 December 1991, the Commission informed the Hellenic Republic that it considered that certain provisions of Law No 1642/1986 on the imposition of VAT and other provisions (*Official Journal of the Hellenic Republic*, Part I, No 125), as amended by Law No 2093/1992 (*Official Journal of the Hellenic Republic*, Part I, No 181), and of Circular No 10/87 of the Finance Ministry of 10 July 1987 were contrary to the abovementioned articles of the Sixth Directive.

3 Since the Hellenic Republic maintained those provisions despite the reasoned opinion which was sent to it on 16 September 1993, the Commission brought the present action.

4 The action originally consisted of three complaints: the first related to the exemption from VAT for international rail transport services as regards the part of the journey within the national territory; the second related to the exemption from VAT for sea voyages in Greek-flagged vessels which do not put in at a foreign port ('round trips'), as regards the part of the journey within territorial waters; the third related to the imposition of VAT on the activities of tour operators carried on outside the Community.

5 After the Commission brought its action, the Hellenic Republic adopted Law No 2303/1995 (*Official Journal of the Hellenic Republic*, Part I, No 80) which makes VAT payable on international rail transport services as regards the part of the journey within the national territory and also exempts from VAT the activities of tour operators carried on outside the Community.

6 Accordingly, the Commission indicated at the hearing that it was abandoning its first and third complaints.

7 In the circumstances, only the Commission's second complaint remains to be examined, relating to the exemption from VAT for round trips by sea.

8 In support of that complaint, the Commission states that Article 2 and Article 9(2)(b) of the Sixth Directive require Member States to charge VAT on round trips as regards the part of the journey within their territorial waters.

9 The Hellenic Republic does not deny that transport services should be subject to VAT as regards the part of the journey within the national territory or in territorial waters. However, it submits, first, that the taxable amount in respect of round trips by sea is not only negligible but also very difficult to determine in practice since vessels may have to change their route unexpectedly. It points out, secondly, that such taxation is not justified since the definitive rules for charging VAT on passenger transport have not yet been adopted and that international maritime transport operations are, in practice, exempt from VAT in all the Member States. It states, thirdly, that even the partial imposition of VAT on round trips by sea puts Community undertakings at a disadvantage in relation to undertakings from non-member countries which are not subject to VAT.

10 The Court has previously held that the specific connection rule for transport services laid down in Article 9(2)(b) of the Sixth Directive is intended to ensure that each Member State taxes transport services as regards the parts of the journey carried out in its territory (Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 16). That article therefore requires Member States to charge VAT on services supplied by operators organizing round trips by sea as regards the part of the journey within territorial waters. That is, moreover, recognized by the Hellenic Republic itself.

11 Furthermore, it is not disputed that the Hellenic Republic may not on a transitional basis grant an exemption for the transport of persons pursuant to Article 28(3)(b) of the Sixth Directive.

12 First of all, the Hellenic Republic may not rely on the practical difficulties confronting it in order to refuse to charge VAT on round trips by sea. Such difficulties do not suffice, in any event, to establish the absolute impossibility for the defendant of properly implementing the Sixth Directive as laid down in the case-law (see, to that effect, Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 12). Moreover, at the hearing, the Commission stated that it was willing to consider the possibility of flat-rate tax on such trips, by way of exception, if the Hellenic Republic proved that there existed serious administrative difficulties.

13 Nor can the Hellenic Republic rely on the fact that the taxable amounts resulting from charging VAT on round trips would be negligible. Even if that were true, which is disputed by the Commission, that fact could not relieve the defendant of the obligation to apply the directive correctly. As the Advocate General observes at point 8 of his Opinion, the Greek Government cannot maintain that the taxable amounts are negligible while at the same time arguing that to charge VAT on round trips would be seriously detrimental to Community undertakings.

14 The Hellenic Republic also cannot rely on the absence of the definitive rules for charging VAT on passenger transport provided for in Article 28(5) of the Sixth Directive. Even if it is true that maintenance on a transitional basis of taxation rules which differ as between the Member States may give rise to distortions of competition, that fact cannot authorize the Hellenic Republic not to apply Articles 2 and 9 of the Sixth Directive correctly and thereby itself to create distortions of

that kind to the detriment of the Member States which transposed the Sixth Directive correctly (see *Commission* v *Germany*, paragraph 25).

15 Finally, the Hellenic Republic may not effectively rely on the VAT exemption applying to international maritime passenger transport and round trips organized by undertakings from non-member countries.

16 First, passenger transport must, in principle, be subject to VAT as regards parts of a journey carried out within territorial waters. It may be exempted from that tax only on the basis of the derogation provisions of the Sixth Directive, such as Article 28(3)(b). The Hellenic Republic cannot effectively rely on the fact that other Member States exempt those transport operations from VAT without authorization to do so in order not to apply the provisions of the Sixth Directive correctly (see, to that effect, Case C-146/89 *Commission* v *United Kingdom* [1991] ECR I-3533, paragraph 47).

17 Secondly, international maritime transport operations and round trips organized from non-member countries are objectively different from round trips starting from a Member State. In particular, such types of transport operations have points of departure or arrival which are different from those of round trips starting from a Member State and as a general rule, therefore, there is less call for them to travel within the territorial waters of the Member State imposing the tax.

18 Accordingly, the Commission's second complaint should be upheld.

19 It should therefore be held that, by exempting from VAT round trips by sea as regards the part of the journey within territorial waters, the Hellenic Republic has failed to fulfil its obligations under Articles 2 and 9(2)(b) of the Sixth Directive.

Costs

20 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 other party's pleadings.

21 According to Article 69(5), a party who discontinues or withdraws from proceedings is to be ordered to pay the costs, unless such withdrawal or discontinuance is justified by the conduct of the opposite party.

22 The Commission abandoned some of the complaints set out in its application in so far as the Hellenic Republic adopted, after the action was brought, some of the measures necessary to make its legislation conform to the Sixth Directive.

23 It follows that the Commission's partial withdrawal was caused by the conduct of the Hellenic Republic which, moreover, was unsuccessful as to the remainder.

24 The Hellenic Republic should therefore be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by exempting from value added tax sea voyages in Greek-flagged vessels which do not put in at a foreign port as regards the part of the journey within territorial waters, the Hellenic Republic has failed to

fulfil its obligations under Articles 2 and 9(2)(b) 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. Orders the Hellenic Republic to pay the costs.

Edward Puissochet Jann

Sevón Wathelet

Delivered in open court in Luxembourg on 23 May 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber