JUDGMENT OF THE COURT (Sixth Chamber)
8 March 2001 *

In Case C-276/98,

Commission of the European Communities, represented by T. Figueira and E. Traversa, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, Â. Seiça Neves and T. Lemos, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by maintaining in force or by introducing legislative provisions applying a reduced rate of value added tax of 5% to the importation and supply of certain goods and to certain services, set out in List I annexed to the Portuguese VAT Code, the Portuguese Republic has failed to fulfil its obligations under 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

* Language of the case: Portuguese.

relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), 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 (approximation of VAT rates) (OJ 1992 L 316, p. 1),

THE COURT (Sixth Chamber),

composed of: V. Skouris, President of the Second Chamber, acting as President of the Sixth Chamber, J.-P. Puissochet, R. Schintgen, F. Macken and N. Colneric (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 October 2000, at which the Commission was represented by T. Figueira and the Portuguese Republic by V. Guimarães, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 23 November 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 20 July 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by maintaining in force or by introducing legislative provisions applying a reduced rate of value added tax ('VAT') of 5% to the importation and supply of certain goods and to certain services, set out in List I annexed to the Portuguese VAT Code, the Portuguese Republic had failed to fulfil its obligations under 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 (OJ 1977 L 145, p. 1), 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 (approximation of VAT rates) (OJ 1992 L 316, p. 1) ('the Sixth Directive').

The Community legislation

2 The Sixth Directive provides that Member States may not fix a rate of VAT lower than a given percentage of the taxable amount. To that end, Article 12(3) provides:

'3. (a) 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.'

3 By Council Directive 96/95/EC of 20 December 1996 amending, with regard to the level of the standard rate of value added tax, Directive 77/388 (OJ 1996 L 338, p. 89), Article 12(3)(a) of the Sixth Directive was replaced by the following:

'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%.

...

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.'

4 Article 28(2) of the Sixth Directive provides:

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

...

(d) Member States which at 1 January 1991 applied a reduced rate to restaurant services, children's clothing, children's footwear and housing, may continue to apply such a rate to such supplies.

(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 Under Article 2 of the Sixth Directive:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

6 Article 4(5) of the Sixth Directive, which concerns the capacity of 'bodies governed by public law' as 'taxable persons', provides:

'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 legislation

7 The Portuguese VAT Code, as approved by Decree-Law 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 Code'), provides in Article 18(1)(a):

'The imports, transfers of goods, and supplies of services mentioned in List I, annexed to this statute are subject to a rate of 5%.'

8 List I of the Portuguese VAT Code, setting out the goods and services subject to a reduced rate of taxation of 5%, includes the following:

'1.8 Ordinary 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 by road 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.'

9 Concerning tolls charged on passage of the Tagus Bridge in Lisbon, by Law No 2/92 the Portuguese Government repealed the reduced rate of 8% in force on 1 January 1991 and introduced, as from that latter date, a normal rate for those tolls. By point 2.19 of Law No 39-B/94, the Portuguese Government re-established a new reduced rate applicable to those tolls.

10 None of the goods or services mentioned in paragraph 8 of this judgment appears on the list in Annex H to the Sixth Directive.

The pre-litigation procedure

11 By a letter of formal notice of 10 April 1996, the Commission informed the Portuguese Government that, in its view, Article 18(1)(a) of the Code was contrary to Articles 12 and 28(2) of the Sixth Directive inasmuch as that national

provision fixed a rate of 5% for certain transactions that were not specified in Annex H to the Sixth Directive.

12 By letters of 2 July and 20 November 1996, the Portuguese authorities informed the Commission of their intention to introduce a new reduced rate of 12%, which had not hitherto existed in Portugal, particularly for transactions not specified in Annex H to the Sixth Directive, with a view to raising the tax on those transactions progressively to the normal rate of 17% in force in Portugal.

13 The Portuguese authorities nevertheless argued that a rate of 12% might be difficult to implement given the social and economic importance of those goods and services and the absence of a stable governing majority in Parliament.

14 Being dissatisfied with the observations of the Portuguese Government, the Commission sent a reasoned opinion pursuant to Article 169 of the Treaty to the Portuguese Republic on 10 June 1997, calling on it to take the necessary measures to comply with that opinion within two months from its notification. That reasoned opinion referred to the reduced VAT rate of 5% applicable, pursuant to Article 18(1)(a) of the Code, to transactions concerning the goods and services referred to in points 1.8, 2.11, 2.19 and 3.8 of List I annexed to the Code.

15 By letter of 10 March 1998, the Portuguese authorities assured the Commission of the Government's intention to seek, in the next budgetary law, the taxation of transactions concerning those goods and services not on the list in Annex H to the Sixth Directive at a rate of 12%, although the political situation was likely to make such an amendment of the applicable rate difficult.

The action

16 In its action, the Commission makes complaint against the Portuguese Republic for having, contrary to Articles 12 and 28(2) of the Sixth Directive, maintained a reduced VAT rate of 5% applicable to transactions concerning the goods listed in points 1.8, 2.11 and 3.8 of List I annexed to the Code, respectively covering wines, machines and equipment designed for research into alternative forms of energy, and agricultural tools and utensils, and for having introduced a reduced rate of 5% on the service referred to in point 2.19 of that list, concerning the passage of the toll bridge over the Tagus in Lisbon.

The reduced rate of VAT applicable to the goods in question

17 Since, on 1 January 1991, the Portuguese Republic applied a reduced rate to transactions concerning the goods specified in points 1,8, 2.11 and 3.8 of List I annexed to the Code, it is entitled to apply a reduced rate of VAT to those transactions by virtue of Articles 12(3)(a) and 28(2) of the Sixth Directive. However, as the Commission has rightly pointed out, the effect of that latter provision is that that reduced rate may not be lower than 12%.

18 The Portuguese Government admits that the internal provisions referred to above are contrary to the Sixth Directive in so far as they fix a reduced rate of 5% rather than 12%. However, it argues that, in the pre-litigation procedure, it expressly stated its intention to raise the rate in question to 12% and that it also referred to the existence of internal political questions to be resolved, particularly in the wine sector. It therefore suggests that the Court should stay the proceedings until the adoption of the law raising the rate of VAT on transactions concerning the goods in question from 5 to 12%.

19 Notwithstanding the allegations of the Portuguese Government, the situation requires the Court not to suspend the proceedings but to uphold the Commission's action as regards the reduced rate of VAT applicable to transactions concerning those goods.

20 It is settled case-law that the Court cannot in any event take account of measures adopted by a Member State after the commencement of an action for failure to fulfil its obligations in order to comply with those obligations (Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 18) and that, moreover, a Member State cannot rely on provisions, practices or circumstances in its own legal order to justify failure to implement a directive within the prescribed period (Case C-274/98 *Commission* v *Spain* [2000] ECR I-2823, paragraph 19).

21 It must therefore be held that, by maintaining in force a reduced VAT rate of 5% applicable to transactions concerning the goods listed in points 1.8, 2.11 and 3.8 of List I annexed to the Code, respectively covering wines, machines and equipment designed for research into alternative forms of energy, and agricultural tools and utensils, the Portuguese Republic has failed to fulfil its obligations under Articles 12 and 28(2) of the Sixth Directive.

The tolls on passage of the bridge over the Tagus

22 The Commission accuses the Portuguese Republic of infringing Articles 12(3) and 28(2) of the Sixth Directive by taxing tolls for crossing the toll bridge over the

Tagus in Lisbon at a reduced VAT rate of 5% rather than the normal rate in Portugal of 17%.

23 However, the Commission has not brought before the Court sufficient evidence for it to establish the existence of the alleged failure to fulfil obligations. Indeed, it has not been established that the service in question was subject to VAT.

24 In that respect, it should be noted that, under Article 2, point 1, of the Sixth Directive, only supplies of services by a taxable person acting as such are subject to VAT.

25 Under Article 4(5) of the same directive, bodies governed by public law are not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they are acting for consideration. As the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be cumulatively fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see, in particular, Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, paragraph 34; C-276/97 *Commission* v *France* [2000] ECR I-6251, paragraph 39; Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 37; Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 49; and Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 34).

26 Here, the Commission has not challenged the fact that, as the Portuguese Government stated at the hearing, it is a body governed by public law, acting as a public authority, that places the toll bridge over the Tagus in Lisbon at the disposal of its users.

27 It must therefore be held that, since the conditions laid down in the first subparagraph of Article 4(5) of the Sixth Directive have been met in this case, the services supplied by the body governed by public law are not taxable. In this context, the Commission is wrong to claim that that provision offers only an option to derogate from the general principle laid down by Article 2, point 1, of the Sixth Directive. It is clear from the wording of Article 4(5) of the Sixth Directive that Member States are not entitled to regard bodies governed by public law as taxable persons in respect of an activity performed in the capacity of a public authority not appearing, as in this case, in Annex D to the Sixth Directive and not fulfilling the conditions specified in the second subparagraph of Article 4(5). Therefore, they may not, by virtue of Article 2, point 1, of the Sixth Directive, tax the transactions carried out by those bodies (see, to that effect, Joined Cases 231/87 and 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda* v *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 33).

28 It is true that, if exemption of the activity in question from VAT would lead to significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive, the provision of access to that bridge on payment of a toll would be taxable by virtue of that same provision. In this case, however, the Commission has not argued the existence of such distortions at any time during the pre-litigation procedure.

29 Therefore, contrary to what the Commission claims, the Portuguese Republic has not, by introducing or maintaining in force the reduced rate of VAT on tolls paid for crossing the bridge over the Tagus, infringed Articles 12(3) and 28(2) of the Sixth Directive. In the context of the present action, it is not necessary to reply to the question whether Portugal has infringed other provisions of that directive. During the pre-litigation procedure, the Commission did not make any complaint based on the infringement of provisions other than those of Articles 12(3) and 28(2) of the Sixth Directive, so that such an infringement does not constitute the subject-matter of the dispute.

30 The Commission's action must therefore be dismissed in so far as it concerns tolls for crossing the bridge over the Tagus in Lisbon.

Costs

31 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 applied for costs and the Portuguese Republic has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by maintaining in force a reduced rate of value added tax of 5% applicable to transactions concerning the goods listed in points 1.8, 2.11 and 3.8 of List I annexed to the Portuguese VAT Code, respectively covering wines, machines and equipment designed for research into alternative forms**

of energy, and agricultural tools and utensils, the Portuguese Republic has failed to fulfil its obligations under 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 (approximation of VAT rates);

2. Dismisses the remainder of the action;

3. Orders the Portuguese Republic to pay the costs.

Skouris Puissochet Schintgen

Macken Colneric

Delivered in open court in Luxembourg on 8 March 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber