JUDGMENT OF THE COURT (Fifth Chamber)
7 March 2002 *

In Case C-169/00,

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

applicant,

v

Republic of Finland, represented by E. Bygglin, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Finnish

APPLICATION for a declaration that, by maintaining in force legislation under which supplies of works of art by artists or their agents and imports of works of art bought directly from artists are exempted from value added tax, the Republic of Finland has failed to fulfil its obligations under Article 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),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr (Rapporteur) and A. La Pergola, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 May 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by maintaining in force legislation under which supplies of works of art by artists or their agents and imports of works of art bought directly from artists are exempted from value added tax ('VAT'), the Republic of Finland has failed to fulfil its obligations under Article 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).

The Community legislation

2 Article 2 of the Sixth Directive provides:

'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'.

3 According to Article 5(1) of the Sixth Directive, '"supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

4 According to Article 6(1) of the Sixth Directive, '"supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5'.

5 Article 12(3)(c) of the Sixth Directive provides:

'Member States may provide that the reduced rate, or one of the reduced rates, which they apply in accordance with the third paragraph of (a) shall also apply to imports of works of art...

Where they avail themselves of this option, Member States may also apply the reduced rate to supplies of works of art...

— effected by their creator or his successors in title,

— ...'

6 Article 13A(1) of the Sixth Directive, entitled 'Exemptions for certain activities in the public interest' provides:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(n) certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned'.

7 Article 28(3)(b) of the Sixth Directive provides that, during the transitional period referred to in paragraph 4, the Member States may 'continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned'.

8 Annex F to the Sixth Directive, which lists the transactions which may be exempt in line with that article, refers, under point 2, to 'Services supplied by authors, artists, performers, lawyers and other members of the liberal professions'.

9 The first paragraph and first indent of Title IX(2)(n) of Annex XV to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and on the revision of the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, the 'Act of Accession') provides:

'For the purposes of implementing Article 28(3)(b), and so long as the same exemption is applied by any of the present Member States, the Republic of Finland may exempt from value added tax:

— services supplied by authors, artists and performers referred to in point 2 of Annex F'.

The Finnish legislation

10 In Finland, VAT is regulated by arvonlisäverolaki (Law on Value Added Tax) (Law No 1501 of 30 December 1993 'the VAT Law'), which came into force on 1 June 1994.

11 Article 46 of the VAT Law provides that:

'The sale of a work of art within the meaning of Article 79c by the artist or the sale of a work of art through an agent which is the property of the artist is not subject to tax'.

12 Article 79c of the VAT Law defines the goods which are to be considered works of art.

13 The second paragraph of Article 94(1) of the VAT law also exempts from VAT the importation of a work of art within the meaning of Article 79c by the owner-artist.

Facts and pre-litigation procedure

14 Taking the view that, by maintaining in force in its national law measures under which supplies of works of art by artists or their agents and imports of works of art bought directly from artists were exempted from VAT, the Republic of Finland was contravening the terms of the Sixth Directive, and in particular Article 2 thereof, the Commission brought the present proceedings.

15 Having given the Republic of Finland formal notice to submit its observations, on 4 November 1998 the Commission sent a reasoned opinion requesting that Member State to take the measures necessary to comply therewith within two months of the date of notification. The Finnish authorities replied that the exemption complained of complied with Title IX(2)(n) of Annex XV to the Act of Accession and denied that there was any infringement, whereupon the Commission decided to bring the present proceedings.

The proceedings

The arguments of the parties

16 The Commission claims that the Republic of Finland has failed to fulfil its obligations under Article 2 of the Sixth Directive by maintaining in force legislation under which supplies of works of art by artists or their agents and imports of works of art bought directly from artists are exempted from VAT.

17 The Commission points out that Article 2 of the Sixth Directive lays down the principle that supplies and imports of goods are to be subject to VAT. It maintains that the Sixth Directive does not provide for the possibility of exempting from VAT the supply or importation of works of art, even where that supply is effected by the artist or his agent. Thus, Annex F to the Sixth Directive, which sets out the transactions which may be exempt, refers in point 2 only to services supplied by authors, artists or performers, so that the sale and importation of works of art are not within the scope of the exception. The Commission adds that Article 12(3)(c) of the Sixth Directive allows a reduced rate of tax to be applied to the supply and importation of works of art.

18 According to the Commission, the interpretation of the exception laid down in point 2 of Annex F to the Sixth Directive must be based on the wording of that provision. In addition, as it is an exception to the primary rule, the provision must be interpreted strictly.

19 The Finnish Government contends that, when it acceded to the European Union, the Republic of Finland negotiated an exception allowing it to maintain in force the exemption laid down in its national law for works of visual art which are the property of the artist.

20 It takes the view that the interpretation of point 2 of Annex F to the Sixth Directive as regards the first sale of a work of art by the artist himself and importation by the owner-artist cannot be based on the wording of that provision alone. Such an interpretation would reduce the scope of application of that provision to the point of rendering it practically non-existent, leaving it to cover almost exclusively the painting of frescos, in respect of which the work created is integrated directly into immovable property of which the purchaser is the owner.

21 According to the Finnish Government, for the interpretation of point 2 of Annex F to the Sixth Directive, account should be taken of the aim of the provision and of the legal context, that is to say the other provisions of the Sixth Directive relating to cultural activities, as well as to the principle of tax neutrality. Account must also be taken of the special nature of the first sale of an object of art, which is essentially the creative inspiration of the artist.

22 First, the aim of point 2 of Annex F to the Sixth Directive is to give to Member States the option of continuing to apply their national rules exempting the activity of authors, artists and performers of works of art.

23 Next, Article 13A(1)(n) of the Sixth Directive, which provides for the exemption of certain cultural services supplied, shows the special status of cultural activities under the Sixth Directive.

24 Finally, an interpretation in line with the strict wording of point 2 of Annex F to the Sixth Directive would undermine the principle of tax neutrality. It would mean that a distinction would be drawn between art forms, for tax purposes, according to whether or not the transfer of the work was effected through the sale of movable property.

25 As regards dealings in works of art of which the owner is the artist, the Finnish Government accepts, however, that the proceedings are founded.

Findings of the Court

26 The present proceedings concern whether the Republic of Finland may exempt from VAT the sale of a work of art by the artist himself or through an agent and the importation of a work of art by the owner-artist, as is laid down by the Finnish VAT law.

27 In order to assess the compatibility of the Finnish legislation in question with the provisions of the Sixth Directive and the Act of Accession, it is appropriate first to review the characteristics of the common system of VAT relevant to the present case.

28 According to Article 2 of the Sixth Directive, the supply of goods or services effected for consideration within the territory of a country by a taxable person acting as such and the importation of goods are to be subject to value added tax.

29 Goods and services are defined in Articles 5 and 6 respectively of the Sixth Directive. According to Article 5(1), 'supply of goods' is to mean the transfer of the right to dispose of tangible property as owner. Under Article 6(1), 'supply of services' is to mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

30 It is clear from the Act of Accession that, during the transitional period referred to in Article 28 of the Sixth Directive, the Republic of Finland may continue to exempt from VAT services supplied by authors, artists and performers referred to in point 2 of Annex F to the Sixth Directive, so long as the same exemption is applied by any of the States which were already Members.

31 An interpretation of the concept of services supplied by artists is therefore needed in order to determine whether that concept also covers the first transfer of works of art by the artist himself, as the Republic of Finland claims, or whether such a transfer is a non-exempt supply of goods, as the Commission argues.

32 It is common ground that the exemption referred to in point 2 of Annex F to the Sixth Directive is an exception to the harmonisation of the VAT systems as set up by that Directive.

33 It is settled case-law that the terms used to specify the exemptions which constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person must be interpreted strictly (see, *inter alia*, to that effect Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13; Case C- 453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, paragraph 19; Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 12; and Case C-150/99 *Stockholm Lindöpark* [2001] ECR 1-493, paragraph 25).

34 A strict interpretation is even more appropriate in this case as point 2 of Annex F to the Sixth Directive is not a harmonised exemption that is an integral part of the VAT regime, but an exemption authorised only for a transitional period.

35 It is clear from the strict wording of the exemption in question that the concept of services supplied by artists does not cover the supply of works of art, even in the case where the supply is effected by the artist or his agent. Such a transfer constitutes a non-exempt supply of goods.

36 Contrary to the arguments of the Republic of Finland, it cannot be deduced from the objective pursued by the exemption for the supply of services by artists or from the legal context of the exemption, that is to say from the other provisions of the Sixth Directive applicable to cultural activities, that it could also extend to the first supply of works of art.

37 In view of the above, the first transfer of a work of art by the artist himself must be considered to be a supply of goods and therefore not exempt.

38 In those circumstances, it must be held that, by maintaining in force legislation exempting from VAT the sale of a work of art by the artist, either directly or through an agent, and the importation of a work of art by the owner-artist, the Republic of Finland has failed to fulfil its obligations under Article 2 of the Sixth Directive.

Costs

39 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 Republic of Finland has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Declares that, by maintaining in force legislation exempting from value added tax the sale of a work of art by the artist, either directly or through an agent, and the importation of a work of art by the owner-artist, the Republic of Finland has failed to fulfil its obligations under Article 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.**

2. Orders the Republic of Finland to pay the costs.

Jann von Bahr La Pergola

Delivered in open court in Luxembourg on 7 March 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber