JUDGMENT OF THE COURT (First Chamber)
25 September 2003 *

In Case C-437/01,

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

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. Aiello, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for a declaration that, by retaining in force a tax on lubricating oils, the Italian Republic has failed to fulfil its obligations under Article 3(2) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), and Article 8(1)(a) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), as amended by Council Directive 94/74/EEC of 22 December 1994 (OJ 1994 L 365, p. 46),

THE COURT (First Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, P. Jann and A. Rosas, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 November 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by retaining in force a tax on lubricating oils, the Italian Republic has failed to fulfil its obligations under Article 3(2) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p.1), and Article 8(1)(a) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46, 'Directive 92/81').

Relevant provisions

Community legislation

2 Article 8(1)(a) of Directive 92/81 states:

'In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community

provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) mineral oils used for purposes other than as motor fuels or as heating fuels;'

3 Under Article 2(1)(d) of Directive 92/81, products falling within CN code 2710, in particular lubricating oils, are mineral oils for the purposes of that directive.

4 Article 2(2) of Directive 92/81 provides that 'mineral oils other than those for which a level of duty is specified in the rates Directive 92/82/EEC shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel.'

5 Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19), as amended by Directive 94/74 ('Directive 92/82'), sets a minimum rate of duty for certain mineral oils. Article 2 lists the mineral oils concerned, and lubricating oils are not referred to.

6 Article 3(2) of Directive 92/12 provides that '[t]he products listed in paragraph 1 [i.e. mineral oils] may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and

VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.'

National legislation

7 Article 21(2) of Legislative Decree No 504 entitled 'Testo unico delle disposizioni legislative concernenti le imposte sulla produzione e sui consumi e relative sanzioni penali e amministrative' (Consolidated Text of Legislative Provisions relating to duties on production and consumption and related criminal and administrative penalties) of 26 October 1995 (GURI No 279 of 29 November 1995, Ordinary Supplement; 'Legislative Decree No 504') makes products falling within CN code 2710 (lubricating oils) used as heating fuel or motor fuel subject to an excise duty fixed at the same rate as that for the equivalent motor fuel or heating fuel.

8 The first paragraph of Article 62 of the Legislative Decree provides:

'Lubricating oils (CN codes 27 10 00 87 to 27 10 00 98), in addition to the duty set out in Article 21(2), are subject to a duty on consumption if intended for use, offered for sale or used other than as heating fuel or motor fuel.'

9 The rate of that tax on consumption is different from the rate of duty referred to in Article 21(2) of Legislative Decree No 504.

Pre-litigation procedure

10 On 4 November 1998 the Commission sent a formal notice to the Italian Republic, stating that the Italian legislation which imposed a tax on the consumption of lubricating oils not intended for use as heating fuel or motor fuel is incompatible with Article 8(1)(a) of Directive 92/81 and Article 3(2) of Directive 92/12 which, according to the Commission, preclude all such national tax measures.

11 In the first instance the Italian Government disputed the infringements set out in the notice.

12 The Commission delivered a reasoned opinion to Italy on 12 November 1999, to which the Italian Government replied acknowledging 'the legitimacy of the comments of the Commission', and stating that, due to its particular structure, the tax concerned could not be inserted in the taxation groups allowed by Community legislation for oils not used as heating fuel or motor fuel.

13 The Italian Republic therefore informed the Commission that it intended to comply with the reasoned opinion as soon as it could.

14 Since no amendment to the Italian legislation in question has been notified to the Commission in this regard, the Commission decided to bring this action.

The infringement

Arguments of the parties

15 The Commission is of the view that the combined effect of Article 8(1)(a) and Article 2(2) of Directive 92/81 and Article 2 of Directive 92/82 is that lubricating oils are subject to excise duty only if they are used as motor fuels or heating fuels. In other cases, they must be exempted from the harmonised excise duty.

16 On this basis, the Commission submits that Italy has infringed Article 8(1)(a) of Directive 92/81 and Article 3(2) of Directive 92/12 by imposing a tax on the consumption of lubricating oils which are intended for use, offered for sale or used for purposes other than as heating fuel or as motor fuel.

17 The Commission notes that in Case C-346/97 *Braathens* [1999] ECR I-3419, the Court held that a tax for environmental purposes on polluting emissions from commercial aviation within Sweden infringed Article 8(1)(b) of Directive 92/81, which provides for the mandatory exemption from the harmonised excise duty in relation to mineral oils used as fuels for the purpose of air navigation other than private pleasure flying. In that judgment the Court held that to allow Member States to impose other forms of indirect taxes on products which, as in this case, must be exempted from the harmonised excise duty under Article 8(1)(b) of Directive 92/81 would render that provision entirely ineffective (paragraph 24) and that a Member State which has introduced such a tax cannot therefore rely on the right conferred by Article 3(2) of Directive 92/12 to maintain or introduce national taxes for specific purposes in respect of products subject to the harmonised excise duty (paragraph 25).

18 Such a situation would render the objective of tax harmonisation meaningless.

19 The Commission also notes that, according to the case-law of the Court, Article 3(2) of Directive 92/12 does not require Member States to comply with all rules applicable for excise duty or value added tax purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned. It is sufficient that the indirect taxes pursuing specific objectives should, on these points, accord with the general scheme of one or other of the taxation techniques as structured by the Community legislation (Case C-434/97 *Commission* v *France* [2000] ECR I-1129, paragraph 27, and Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 47).

20 The Commission claims that the tax at issue cannot be considered to accord with the general scheme of the directives on harmonised excise duties on mineral oils. The tax infringes Article 8(1) of Directive 92/81 in that it taxes a category of products which the Member States are unconditionally obliged to exempt from the harmonised excise duty. The tax also infringes Article 3(2) of Directive 92/12 in that it does not comply with the general scheme of the rules on excise duties on mineral oils in relation to calculation methods and determination of the tax base. Application of the harmonised excise duty rate (calculation methods) to an exempt taxable item (tax base) should result in a tax equal to zero, whereas the Italian tax on consumption results in a high rate of tax.

21 The Italian Government claims in its defence that it has brought the national legislation into line with Community law.

22 It submits that Article 6 of Decree-Law No 452 on 'Disposizioni urgenti in tema di accise, di gasolio per autotrazione, di smaltimento di oli usati, di giochi e scommesse, nonché sui rimborsi IVA' (Urgent provisions in relation to excise duties, diesel oil for vehicles, the disposal of used oils, gaming and betting, and VAT reimbursements) of 28 December 2001 (GURI No 301 of 29 December 2001, p. 9; 'Decree-Law No 452') has abolished the tax on consumption of lubricating oils under the first paragraph of Article 62 of Legislative Decree No 504.

23 The Commission does not dispute that the tax on consumption of lubricating oils has been repealed by Decree-Law No 452.

24 It notes however that Article 7 of the Decree-Law has introduced a new tax called 'contribution to environmental recycling and improvement' on the same lubricating oils taxed previously by the tax on consumption, which it claims constitutes an 'extension' of the abolished tax on consumption in a different form.

25 According to the Commission, the contribution introduced by Article 7 of Decree-Law No 452 is levied on the same products as the tax on consumption. Moreover the rate is set in the same way as the previous tax.

26 The fact that the amount to be paid as the new contribution is set at a flat rate in Decree-Law No 452 precludes it from being considered a payment for a service rendered by undertakings collecting, recycling or disposing of used lubricating oils to undertakings using this type of oils. In addition, the contribution is levied at the same fixed rate for both recycable and unrecyclable used oils.

27 The Commission also claims that the payment of the contribution to recycling and disposal undertakings is not specified. Therefore the proceeds have to be entered as a receipt in the Italian state budget.

28 In the light of the fact that the purpose of and the rules concerning the two compulsory levies are effectively identical, the Commission reiterates in the reply the form of order sought in the application. It states however that in any event, according to settled case-law, the question whether a Member State has failed to fulfil its obligations is to be assessed as at the expiry of the period laid down in the reasoned opinion. In this case, the date of expiry was 12 January 2000.

Findings of the Court

29 It is common ground that the first paragraph of Article 62 of Legislative Decree No 504 provided that lubricating oils were subject to a tax on consumption when they were intended for use, offered for sale or used for purposes other than as heating fuel or motor fuel.

30 However under Article 8(1)(a) and Article 2(2) of Directive 92/81, in conjunction with Article 2 of Directive 92/82, lubricating oils may be subject to excise duty only if intended for use, offered for sale or used as motor fuel or heating fuel. In other cases they must be exempted from the harmonised excise duty.

31 The Court has already held that to allow the Member States to levy another indirect tax on products which must be exempted from harmonised excise duty under Article 8(1)(b) of Directive 92/81 would render that provision entirely ineffective (*Braathens*, paragraph 24).

32 The same reasoning may be applied to the exemption laid down in Article 8(1)(a) of Directive 92/81.

33 The Member States cannot therefore rely on the right conferred by Article 3(2) of Directive 92/12 to maintain or introduce national taxes for specific purposes in respect of products which must be exempted from the harmonised excise duty in accordance with Article 8(1) of Directive 92/81 (see, to this effect, *Braathens*, paragraph 25).

34 The Commission's application must therefore be considered well founded with regard to Legislative Decree No 504.

35 As regards Decree-Law No 452, which the Commission alleges has not put an end to the infringement since the Italian Republic has essentially merely formally repealed the provision imposing the disputed tax while reintroducing the same tax under a different name, suffice it to note that the Decree-Law was adopted after the date of expiry of the date laid down in the reasoned opinion.

36 It must be borne in mind that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26; Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7 and Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9).

37 For the purposes of this application there is therefore no need to determine whether Decree-Law No 452 has put an end to the infringement. It is sufficient to find that, by retaining in force a tax on the consumption of lubricating oils under the first paragraph of Article 62 of Legislative Decree No 504 beyond the expiry of the period laid down in the reasoned opinion, the Italian Republic has failed to fulfil its obligations under Article 3(2) of Directive 92/12 and Article 8(1)(a) of Directive 92/81.

Costs

38 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 Italian Republic has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Declares that, by retaining in force a tax on lubricating oils under the first paragraph of Article 62 of Legislative Decree No 504 of 26 October 1995,**

'Testo unico delle disposizioni legislative concernenti le imposte sulla produzione e sui consumi e relative sanzioni penali e amministrative' (Consolidated Text of Legislative Provisions relating to duties on production and consumption and related criminal and administrative penalties) beyond the expiry of the period laid down in the reasoned opinion, the Italian Republic has failed to fulfil its obligations under Article 3(2) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, and Article 8(1)(a) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, as amended by Council Directive 94/74/EC of 22 December 1994;

2. Orders the Italian Republic to pay the costs.

Wathelet Jann Rosas

Delivered in open court in Luxembourg on 25 September 2003.

R. Grass

Registrar

M. Wathelet

President of the First Chamber