JUDGMENT OF THE COURT (Third Chamber)

28 September 2006 *

In Case C-128/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 18 March 2005,

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented initially by H. Dossi, and subsequently by M. Fruhmann, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet, A. Borg Barthet (Rapporteur), U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by allowing taxable persons not established in Austria who transport passengers there not to submit tax return forms and not to pay the net amount of value added tax ('VAT') when their annual turnover in Austria is below EUR 22 000, in that case deeming the amount of VAT due to be equal to the amount of deductible VAT and making application of the simplified rules contingent on Austrian VAT not appearing on invoices or in other documents serving as invoices,

the Republic of Austria has failed to fulfil its obligations under Articles 2, 6, 9(2)(b), 17, 18 and 22(3) to (5) of 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 arrangement of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

Legal context

The Sixth Directive

2 Under Article 2(1) of the Sixth Directive, any supply of services effected for consideration within the territory of a Member State is subject to VAT.

3 Under the first subparagraph of Article 6(1) of the directive, '"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5'.

4 Article 9(2)(b) of that directive provides that 'the place where transport services are supplied shall be the place where transport takes place, having regard to the distances covered'.

5 Articles 17 and 18 of the Sixth Directive lay down rules governing the origin, scope and exercise of the right to deduct, which is the cornerstone of the VAT arrangement.

6 Article 18(1)(a) provides, inter alia, that to exercise his right to deduct the taxable person must, 'in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3)'. Under the first subparagraph of Article 18(2), 'the taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1'.

7 Article 22(3), (4) and (5) of the Sixth Directive lays down, respectively, the conditions for issuing invoices, the procedures for submitting periodic returns and the obligation on taxpayers to pay the net amount of the VAT owed when submitting the return.

8 Article 24 of the directive, headed 'Special scheme for small undertakings', states in paragraph 1:

'Member States which might encounter difficulties in applying the normal tax scheme to small undertakings by reason of their activities or structure shall have the option, under such conditions and within such limits as they may set but subject to the consultation provided for in Article 29, of applying simplified procedures such as flat-rate schemes for charging and collecting the tax provided they do not lead to a reduction thereof.'

9 Article 24(2) to (7) in addition allows Member States to retain or introduce exemptions or graduated VAT relief for taxable persons whose annual turnover is less than EUR 5 000.

National legislation

10 The regulation of the Federal Finance Minister on the establishment of average rates for calculating amounts deductible by foreign undertakings providing international passenger transport (BGBl. II, 166/2002; 'the regulation of the Finance Minister') provides:

'On the basis of Paragraph 14(1)(2) of the Umsatzsteuergesetz (Law on turnover tax) 1994, BGBl. 663/1994, in the version under Federal Law BGBl. I, 56/2002, it is provided as follows:

1. Carriers who have neither a domicile (seat), place of business or usual residence in the national territory and whose turnover, in accordance with Paragraph 1(1)(1) and (2), is less than EUR 22 000 in a given tax period may calculate their deductible VAT, in accordance with Paragraph 12 of the Law on turnover tax 1994, in respect of their turnover from occasional international passenger transport by motor vehicles or trailers not registered in Austria, by applying an average rate of 10% of that turnover from such activity (Paragraph 1(1)(1) and (2) of the Law on turnover tax 1994) if they do not issue invoices within the meaning of Paragraph 11 of the Law on turnover tax 1994 for the abovementioned services involving the international transport of persons.

2. The average rate is in lieu of all amounts deductible in respect of the services mentioned in Paragraph 1 involving the international transport of persons.

3. If the amount deductible is calculated in accordance with Paragraph 1, the person is exonerated from the obligation to keep accounts pursuant to Paragraph 18(2)(5) and (6) of the Law on turnover tax 1994.

4. This regulation applies to transactions and events taking place after 31 March 2002.'

Pre-litigation procedure

11 The Commission, by letters of 13 March 2000 and 17 October 2003 respectively, put the Republic of Austria on notice and required it to submit its observations within two months of the second of those letters.

12 After receiving the response of the Republic of Austria to that letter, the Commission, on 9 July 2004, issued a reasoned opinion asking that Member State to adopt the measures necessary to comply with that opinion within a period of two months from the date of notification. The Austrian authorities replied to the reasoned opinion by letter of 6 September 2004.

13 Taking the view that that reply was unsatisfactory, the Commission decided to bring the present action.

The action

The scope of the dispute

14 The Commission alleges that the Republic of Austria has, by the regulation of the Finance Minister, infringed Articles 2, 6, 9(2)(b), 17, 18 and 22(3) to (5) of the Sixth Directive. The Member State bases its defence entirely on the provisions of Article 24(1) thereof.

15 As the Advocate General notes in points 24 to 26 of her Opinion, the provisions referred to by the Commission are not all relevant in the context of the action which it has brought. Articles 2, 6, 9(2)(b) and 17 of the Sixth Directive state principles in the light of which the procedural conditions set out in Articles 18 and 22 are to be applied. The Commission's allegations do not indicate in what way the regulation of the Finance Minister has infringed the principles that supplies of services are subject to VAT (Article 2 of the directive); passenger transport is a service (Article 6); the place of supply of international passenger transport is fixed according to the distance covered in each Member State (Article 9(2)(b)); a taxable person is entitled to deduct input tax from output tax or, as the case may be, to obtain a refund of input tax (Article 17). On the contrary, the scheme implemented by the abovementioned regulation assumes that all those principles apply. However, it may be contrary to the provisions of Articles 18 and 22 of the directive concerning VAT invoicing, accounting and submission of returns.

16 Consequently, if the pleas in defence submitted by the Republic of Austria, which are based entirely on the applicability of Article 24(1) of the Sixth Directive to that arrangement, were to be rejected, only a finding of infringement of Articles 18(1)(a) and (2) and 22(3) to (5) would be possible.

17 The Commission's reasoning turns on three main arguments which seek to establish that the derogatory scheme instituted by the regulation of the Finance Minister is not covered by Article 24(1) of the Sixth Directive. Firstly, that scheme applies to undertakings having annual turnover in Austria of less than EUR 22 000, which does not correspond to the concept of 'small undertakings' for the purposes of that provision. Secondly, the Republic of Austria has not shown that such a scheme does not lead to a reduction in tax. Finally, that provision authorises Member States to apply simplified procedures, but does not permit them to grant total exemption to the undertakings concerned.

18 The Republic of Austria disputes those objections and maintains that the specific scheme laid down for international passenger transport carriers not established in Austria whose turnover there is less than EUR 22 000 is covered by Article 24(1) of the Sixth Directive.

19 In order to assess whether the action is well founded, it is necessary to ascertain whether, within the meaning of Article 24(1) of the Sixth Directive, the scheme instituted by the regulation of the Finance Minister may be regarded as having established 'simplified procedures ... for charging and collecting the tax', whether it

results in a reduction in tax and whether it applies only to 'small undertakings'. In that regard, it is sufficient that the arrangement fail to satisfy one of those criteria in order for that provision not to apply.

With regard to the simplified procedures for charging and collecting tax

Arguments of the parties

20 The Commission submits that the scheme instituted by the regulation of the Finance Minister exonerates the undertakings in question from the obligation to issue invoices, account for the VAT and, consequently, from declaring and paying it. Since the tax rate applicable to passenger transport is 10% and a deduction of the same percentage is allowed, the result, according to the Commission, is that the tax debt is reduced to zero. Thus, such a scheme does not constitute simplification of the VAT charging and collecting procedures but amounts to an exemption, which goes beyond what is permitted by Article 24(1) of the Sixth Directive.

21 With regard to the argument that the dispensation under the scheme represents the formal aspect of an excessive simplification that is equivalent to an exemption, the Republic of Austria contends that Article 24(1) of the Sixth Directive lays down no restrictions in that regard. Moreover, it submits that the provision confers on the Member States a broad power of assessment concerning the introduction of flat-rate schemes or other simplified procedures for charging and collecting VAT in the case of small undertakings, referring in that regard to Joined Cases 138/86 and 139/86 *Direct Cosmetics and Laughtons Photographs* [1988] ECR 3937, paragraph 41.

Findings of the Court

22 Firstly, it should be recalled that Article 24(1) of the Sixth Directive gives Member States the option of applying a special scheme to small undertakings, which constitutes an exception to the normal rules of the directive (see, to that effect, Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 34). Like the other special schemes provided for in Articles 25 and 26 of the directive, the scheme under Article 24 must be applied only to the extent necessary to achieve its objective (see, to that effect, Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 35). Moreover, it is settled case-law that any exception to or derogation from a general rule is to be interpreted strictly (Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 19, and Case C-321/02 *Harbs* [2004] ECR I-7101, paragraph 27).

23 Furthermore, contrary to the submissions of the Republic of Austria, it cannot be inferred from the *Direct Cosmetics and Laughtons Photographs* judgment that the Member States enjoy a broad power of assessment in the choice of simplified procedures which they decide to introduce with regard to VAT. It is clear from paragraph 41 of that judgment that in it the Court considered solely the scope of the power of assessment enjoyed by a Member State when deciding whether or not to adopt simplified procedures under Article 24(1) of the Sixth Directive.

24 The scheme instituted by the regulation of the Finance Minister exempts international passenger transport carriers meeting certain criteria from the obligation of keeping VAT accounts. Since they are not required to issue invoices showing VAT, those carriers may apply an average rate to the turnover achieved in Austria equivalent to that which is deductible but, in that case, they may no longer

claim other deductible amounts in the refund procedure. Such an exemption thus means that the VAT is neither declared nor paid, a fact which is not disputed by the Republic of Austria.

25 Article 24(1) of the Sixth Directive provides that Member States have the option 'of applying simplified procedures such as flat-rate schemes for charging and collecting the tax'. The wording of the provision does not show that they may exempt small undertakings totally from their obligation to pay VAT, since it permits the charging procedures merely to be simplified and makes no mention of any possibility of exempting the undertaking concerned entirely from VAT. Moreover, in the case of an exemption such as that laid down by the regulation of the Finance Minister, moreover, the VAT is not charged, so that the 'charging procedures', even very simplified ones, to which that provision expressly refers no longer exist. In addition, the 'flat-rate schemes' referred to as examples of simplified charging procedures are an illustration of the fact that, under the arrangement envisaged by that provision, undertakings are actually required to pay VAT. Thus, the concept of 'simplified procedures' cannot include a total lack of charging and collecting of the tax.

26 That interpretation is supported by Article 24(2) to (5) of the Sixth Directive; those provisions refer expressly to the Member States' option to apply an 'exemption from tax', whereas Article 24(1) does not. The absence of an express reference suggests that tax exemptions are not included in the simplified charging procedures which may be implemented by the Member States under Article 24(1).

27 It follows from the foregoing observations that the scheme instituted by the regulation of the Finance Minister exceeds the powers enjoyed by the Member States under Article 24(1) of the Sixth Directive, since it does not adopt 'simplified procedures ... for charging and collecting the tax' but exempts the undertakings concerned from declaring and paying VAT. In those circumstances, it is not necessary to consider whether the Commission's other arguments are well founded and show that, contrary to the submissions of the Republic of Austria, such a scheme cannot be justified in the light of that provision.

28 Accordingly, the arrangement must be regarded as contrary to the provisions of the Sixth Directive.

29 Consequently, it must be held that, by allowing taxable persons not established in Austria who transport passengers there not to submit tax return forms and not to pay the net amount of VAT when their annual turnover in Austria is below EUR 22 000, in that case deeming the amount of VAT due to be equal to the amount of deductible VAT and making application of the simplified rules contingent on Austrian VAT not appearing on invoices or in other documents serving as invoices, the Republic of Austria has failed to fulfil its obligations under Articles 18(1)(a) and (2) and 22(3) to (5) of the Sixth Directive.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the Commission asked for the Republic of Austria to be ordered to pay the costs and the Republic of Austria has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **By allowing taxable persons not established in Austria who transport passengers there not to submit tax return forms and not to pay the net amount of VAT when their annual turnover in Austria is below EUR 22 000, in that case deeming the amount of VAT due to be equal to the amount of deductible VAT and making application of the simplified rules contingent on Austrian VAT not appearing on invoices or in other documents serving as invoices, the Republic of Austria has failed to fulfil its obligations under Articles 18(1)(a) and (2) and 22(3) to (5) of 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 arrangement of value added tax: uniform basis of assessment;**

2. **Dismisses the action as to the remainder;**

3. Orders the Republic of Austria to pay the costs.

[Signatures]