JUDGMENT OF THE COURT (Fifth Chamber)

18 January 2001 *

In Case C-83/99,

Commission of the European Communities, represented by M. Díaz-Llanos La Roche and C. Gómez de la Cruz, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by applying a reduced rate of value added tax to the supply of services consisting in making road infrastructure available to users, the Kingdom of Spain has failed to fulfil its obligations under Article 12 of

* Language of the case: Spanish.

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 96/95/EC of 20 December 1996 (OJ 1996 L 338, p. 89),

THE COURT (Fifth Chamber),

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

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 March 1999, 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 applying a reduced rate of value added tax (VAT) to the supply of services consisting in making road infrastructure available to users, the Kingdom of Spain had failed to fulfil its obligations under Article 12 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 96/95/EC of 20 December 1996 (OJ 1996 L 338, p. 89) ('the Sixth Directive').

Legal background

Community legislation

2 Under Article 2(1) of the Sixth Directive, VAT is chargeable on the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

3 Article 12(3)(a) of the Sixth Directive provides:

'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 only apply to supplies of the categories of goods and services specified in Annex H.'

4 Annex H to the Sixth Directive, entitled 'List of supplies of goods and services which may be subject to reduced rates of VAT', mentions as category 5 'Transport of passengers and their accompanying luggage'.

National legislation

5 Royal Decree No 14/1997 of 29 August 1997 and Law No 9/1998 of 21 April 1998 amending Law No 37/1992 of 28 December 1992 on value added tax provided for a reduced rate of VAT of 7% to apply to motorway tolls, which were previously subject to the standard rate of 16%.

Pre-litigation procedure

6 By letter of 22 December 1997, the Commission informed the Spanish Government that it considered that, by applying a reduced rate of VAT to the supply of services consisting in making road infrastructure available to users, the Kingdom of Spain was in breach of Article 12 of the Sixth Directive. Pursuant to Article 169 of the Treaty, it gave formal notice to the Spanish Government to submit its observations on the point within two months.

7 In its reply of 24 April 1998, the Spanish Government submitted that the making available of motorways in return for payment of a toll receives very different tax treatment in the various Member States, some of which do not subject that activity to VAT, and that, in order to compensate for the resulting distortion, the Spanish authorities had decided to apply a reduced rate of VAT of 7% to that activity. The Spanish Government also stated that the application of the reduced rate was consistent with the provisions of category 5 in Annex H to the Sixth Directive.

8 Since it did not regard the explanations given by the Spanish authorities as satisfactory, the Commission by letter of 10 August 1998 sent the Kingdom of Spain a reasoned opinion, restating the complaint set out in its letter of formal notice and requesting Spain to take the necessary measures to comply with the reasoned opinion within two months.

9 In their reply of 21 October 1998, the Spanish authorities denied the alleged failure to fulfil obligations, on the same grounds as those previously stated.

10 As the Kingdom of Spain had not complied with the reasoned opinion, the Commission brought the present action.

Substance

11 The Court has held, first, that making road infrastructure available on payment of a toll constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive, and, second, that Article 4(5) of the Sixth Directive, under which the activities of bodies governed by public law in which they engage as public authorities are exempt from VAT, does not apply to the activities of operators governed by private law (see Case C-276/97 *Commission* v *France* [2000] ECR I-6251, paragraphs 36 and 46, Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraphs 34 and 44, Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraphs 46 and 56, Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraphs 30 and 40, and Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, paragraphs 31 and 40).

12 It is common ground that in Spain the activity of making road infrastructure available to users on payment of a toll is carried out not by a body governed by public law but by operators governed by private law.

13 Consequently, as is moreover not contested by the Kingdom of Spain, the activity in question relates to supplies of services subject to VAT and is carried on in Spain by economic operators who are taxable persons for VAT purposes in respect of that activity.

14 The sole issue in the present action is therefore whether, by applying a reduced rate of VAT to those supplies of services instead of the standard rate, the Kingdom

of Spain has failed to fulfil its obligations under Article 12(3)(a) of the Sixth Directive.

15 The Commission's argument is that, since the option of applying reduced rates provided for in the Sixth Directive constitutes an exception, it can only apply strictly to the categories of goods and services listed in Annex H. In the present case, to treat the making available of a motorway as a supply of services relating to the transport of passengers and their accompanying luggage is contrary to the directive.

16 The Spanish Government submits, on the contrary, that the making available of road infrastructure by private operators may be regarded as the activity of the transport of passengers and their accompanying luggage, and may therefore enjoy a reduced rate of VAT. It argues that this interpretation of the Sixth Directive is justified by the need to compensate for the distortions of competition which affect companies operating motorways in Spain because other Member States do not charge VAT on motorway tolls.

17 On this point, it must be observed that, in the absence of a definition in the Sixth Directive of the activity of 'transport of passengers and their accompanying luggage' referred to in category 5 in Annex H, that provision should be interpreted in the light of its context within the Sixth Directive and not by reference to considerations such as those relied on by the Spanish Government relating to differences in the way the directive is applied in the Member States.

18 It follows from Article 12(3)(a) of the Sixth Directive that the application of one or two reduced rates is an option accorded to the Member States as an exception to the principle that the standard rate applies. Moreover, according to that provision, the reduced rates of VAT may be applied only to the supplies of goods and services specified in Annex H.

19 It is settled case-law that provisions which are in the nature of exceptions to a principle must be interpreted strictly (see, *inter alia*, Case C-399/93 *Oude Luttikhuis and Others* v *Coberco* [1995] ECR I-4515, paragraph 23, Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, paragraph 31, and Case C-216/97 *Gregg* v *Customs and Excise* [1999] ECR I-4947, paragraph 12).

20 Consequently, the expression 'transport of passengers and their accompanying luggage' must be interpreted in accordance with the usual meaning of those words.

21 The making available of road infrastructure to users on payment of a toll does not consist in the provision of a means of transport but in permitting users who have a vehicle to make a journey in better conditions. That activity cannot therefore be treated as an activity of transport of passengers and their accompanying luggage within the meaning of category 5 in Annex H to the Sixth Directive.

22 The Spanish Government submits, as justification for its failure to fulfil its obligations under the Sixth Directive, that the length of the procedures initiated by the Commission against the Member States not charging VAT on the activity of making road infrastructure available gave rise to a legitimate expectation on the part of the Kingdom of Spain that the Sixth Directive did not necessarily require the standard rate of VAT to be applied to that activity.

23 In response to that submission, the Court must reiterate that the procedure for a declaration of a failure on the part of a Member State to fulfil an obligation

affords a means of determining the exact nature of the obligations of the Member States in case of differences of interpretation (Case 7/71 *Commission* v *France* [1971] ECR 1003, paragraph 49) and is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation (see, *inter alia*, Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14).

24 Moreover, the principle of the protection of legitimate expectations, which is the corollary of the principle of legal certainty, is generally relied upon by individuals (economic operators) in a situation where they have legitimate expectations created by the public authorities, and cannot be relied on by a Government in order to avoid the consequences of a decision of the Court declaring a Community provision invalid (Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 67).

25 In view of the foregoing, it must be emphasised that the principle of protection of legitimate expectations cannot, in a case such as the present, be relied on by a Member State to preclude an objective finding of a failure on its part to fulfil its obligations under the Treaty or secondary legislation, since to admit that justification would run counter to the aim pursued by the procedure under Article 169 of the Treaty (see, to that effect, Case 288/83 *Commission* v *Ireland* [1985] ECR 1761, paragraph 22, and Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 45).

26 The reliance by the Kingdom of Spain on the principle of the protection of legitimate expectations is therefore not in any event capable of precluding a finding in the present case that the Member State has failed to fulfil its obligations.

27 In those circumstances, it must be held that, by applying a reduced rate of VAT to the supply of services consisting in making road infrastructure available to users

on payment of a toll, the Kingdom of Spain has failed to fulfil its obligations under Article 12(3)(a) of the Sixth Directive.

Costs

28 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 Kingdom of Spain has been unsuccessful and the Commission has applied for costs, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Declares that, by applying a reduced rate of value added tax to the supply of services consisting in making road infrastructure available to users on payment of a toll, the Kingdom of Spain has failed to fulfil its obligations**

under Article 12(3)(a) 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 96/95/EC of 20 December 1996;

2. **Orders the Kingdom of Spain to pay the costs.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 18 January 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber