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Judgment of the Court of 2 August 1993. - Commission of the European Communities v French Republic. - Penalties for infringement of VAT legislation - Disproportionate nature. - Case C-276/91.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover tax ° Common system of value added tax ° National system of penalties for tax evasion ° Differentiation between importation and domestic system ° Whether permissible ° Condition ° Difference between penalties not to be disproportionate

(EEC Treaty, Art. 95; Council Directive 77/388)

Summary

Although the Member States are not required to have the same systems of penalties for offences relating to value added tax payable on importation and for offences relating to the same tax in connection with transactions within the country, since the two categories of offence cannot be equally easily detected, the degree of difficulty in detecting an offence cannot justify a manifest disproportion in the severity of the penalties laid down for the two categories of offence. Such disproportion arises, thus constituting a failure to fulfil the obligations arising from Article 95 of the Treaty, where offences committed on importation give rise to the confiscation of the goods in respect of which the offence was committed and a fine equivalent to the value of those goods or up to twice that amount, whereas offences under the domestic system are punishable only by a fine proportionate to the amount of tax evaded.

Parties

In Case C-276/91,

Commission of the European Communities, represented by Johannes Foens Buhl, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Philippe Pouzoulet, Deputy Director of the Directorate for Legal Affairs at the Ministry of Foreign Affairs, and Jean-Louis Falconi, Secretary for Foreign Affairs at the same Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

defendant,

APPLICATION for a declaration that, by introducing and applying provisions of law, regulation or administrative action in force under Article 414 of the French Customs Code, which penalize offences concerning the payment of value added tax on importation from another Member State more severely than those concerning the payment of value added tax on domestic transactions, the French Republic has failed to fulfil its obligations under Article 95 of the Treaty establishing the European Economic Community,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President of Chamber, acting for the President, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse and D.A.O. Edward, Judges,

Advocate General: C.O. Lenz,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 January 1993,

after hearing the Opinion of the Advocate General at the sitting on 17 February 1993,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 25 October 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by introducing and applying provisions of law, regulation or administrative action in force under Article 414 of the French Customs Code, which penalize offences concerning the payment of value added tax on importation from another Member State more severely than those concerning the payment of value added tax on domestic transactions, the French Republic has failed to fulfil its obligations under Article 95 of the Treaty.

2 The French legislation provides for two systems of penalties for offences concerning value added tax. The first, which applies to offences relating to transactions within the country, involves fiscal penalties and criminal penalties. The second, which applies to offences committed on the importation of certain goods into national territory, involves criminal penalties only.

3 In the case of offences relating to domestic transactions, Article 2(2) of Law No 87-502 of 8 July 1987 amending fiscal and customs procedures (Journal Officiel de la République Française of 9 July 1987, p. 7470) (hereinafter "the Law of 8 July 1987") provides for a fiscal penalty in the form of a 10% surcharge on the amount due, which rises to 40% after a first demand for payment and 80% after a second. Articles 1741 and 1750 of the General Taxation Code also provide for criminal penalties: a fine of between FF 5 000 and FF 250 000, a term of imprisonment from one to five years and, where appropriate, suspension of the offender' s driving licence for not more than three years.

4 For offences committed on the importation of heavily taxed goods, which, at the relevant date, included cars, then subject to a VAT rate of 33 %, Article 414 of the Customs Code lays down criminal penalties, namely the payment of a fine equal to the value of the goods in respect of which the offence was committed or up to twice that amount, the confiscation of the goods and imprisonment for a maximum of three years. In addition, pursuant to Article 2 II of the Law of 8 July 1987, such offences may be the subject of a compromise entailing the payment, for each month of delay, of 5% of the VAT evaded where the tax is paid after a delay of between three and 16 months, and 80% where the tax is paid after a delay of more than 16 months.

5 The action in this case was brought as the result of proceedings between a Belgian national, Mrs Patron, and the French customs authorities. She was alleged by the latter to have used in France her private car, which was registered in Belgium, without paying VAT although, according to the customs authorities, she normally resided in France. Mrs Patron refused the compromise she was offered, and was ultimately ordered to pay a fine which, in view of the substantial mitigating circumstances in her favour, was fixed at FF 22 000 for the customs offence of importing a car without making a declaration, and the vehicle was confiscated.

6 By letter of 27 April 1989, the Commission informed the French Government that it considered the penalties laid down by Article 414 of the Customs Code to be contrary to Article 95 of the Treaty in two respects. First, they were more severe than the penalties for offences in connection with transactions within the country and such difference was disproportionate to the dissimilarity between the two categories of offence (Case 299/86 Drexl [1988] ECR 1213). Secondly, those penalties failed to take account of the residual portion of the VAT paid in the State of exportation, contrary to the principle laid down by the Court in the judgments in Case 15/81 Gaston Schul, Douane Expediteur v Inspecteur der Invoerrechten en Accijnzen [1982] ECR 1409, and Case 47/84 Staatssecretaris van Financiën v Gaston Schul Douane-Expediteur [1985] ECR 1491.

7 On 26 July 1990, since it had received no reply from the French Government, the Commission sent it a reasoned opinion in which it reiterated the complaints set out in the letter of formal notice and requested the French Government to take the measures necessary to comply with the opinion within two months.

8 There was no response to that request either. The Commission, by application of 25 October 1991, therefore brought this action for failure to fulfil Treaty obligations.

9 Reference is made to the Report for the Hearing for a fuller account of the national legislation in question, the course of the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 In view of the form of order sought in the application, it should be observed that the purpose of the action is essentially to obtain a declaration that, by introducing and applying, under Article 414 of the Customs Code, a system of penalties for offences concerning the VAT due on importation which is more severe than the system of penalties laid down elsewhere for offences concerning the payment of VAT on domestic transactions, the French Republic has failed to fulfil its obligations under Article 95 of the Treaty.

11 The French Government states, first, that since the material events the harmonization of VAT rates decided upon at Community level has led to the disappearance of the category of heavily taxed goods within the meaning of Article 414 of the Customs Code. On this point it refers to Article 11 of Law No 91-716 of 26 July 1991, which in fact provides for the final abolition of the higher rate of VAT as from 1 January 1993.

12 In reply to that argument, it is sufficient to observe that, as the Court has consistently held, the subject-matter of an action under Article 169 is determined in the Commission' s reasoned opinion and that, even where the default has been remedied after the period prescribed by the second paragraph of that article, there is still an interest in pursuing the action (see the judgment in Case 39/72 Commission v Italy [1973] ECR 101, paragraph 9).

13 In answer to the Commission' s complaint concerning the disproportion between penalties, the French Government goes on to say that, pursuant to Article 95 of the Treaty as interpreted by the Drexl judgment, cited above, the Member States are not obliged to lay down identical systems of penalties for offences concerning the VAT due on importation and for offences connected with VAT on transactions within the country. In this case, the penalties for the latter offences are less severe than the penalties for those concerning the VAT due on importation because they may be detected more easily by reason of the obligations to be fulfilled by taxable persons. In the framework of the domestic system, the seller of a vehicle is required to draw up a whole series of documents which enable the tax authorities to detect tax evasion whereas, in the framework of the system for VAT on importation, crossing the border is the only act in the course of which evasion may be detected and the offender identified.

14 On this point it must be confirmed that the Member States are not required to have the same system of rules for the two categories of offence since they cannot be equally easily detected.

15 However, as the Court stressed in the Drexl judgment, cited above, the degree of difficulty in detecting an offence cannot justify a manifest disproportion in the severity of the penalties laid down for the two categories of offence.

16 Consequently it is necessary to ascertain whether, in this case, such difference is manifestly disproportionate.

17 In that respect the French Government states that the criminal penalties laid down by Articles 1741 and 1750 of the General Taxation Code for offences connected with the VAT due on a transaction within the country are comparable with the criminal penalties laid down by Article 414 of the Customs Code for offences relating to the VAT due on importation.

18 That argument cannot be upheld.

19 Failure to declare the importation of goods and to pay the VAT arising is, as such, made a criminal offence without the need to prove fraudulent intent and, under Article 414 of the Customs Code, the penalty is a fine equal to the value of the goods or up to twice that amount, the confiscation of the vehicle and imprisonment for a maximum of three years. That provision in fact refers to "any act of importing ... without declaration".

20 By contrast, in the framework of the internal system, mere failure to declare a transaction subject to VAT entails the payment of default interest and a surcharge equivalent to 10% of the tax due, 40% after a first demand for payment and 80% after a second demand for payment. Only if the national authorities can show that the act was accompanied by fraudulent intent on the part of the offender does it constitute a criminal offence punishable by a fine of between FF 5 000 and FF 250 000, a term of imprisonment of between one and five years and, where appropriate, suspension of the offender' s driving licence for a maximum of three years, pursuant to Articles 1741 and 1750 of the General Taxation Code.

21 Therefore the threshold at which criminal penalties are imposed is lower in the case of an offence concerning the VAT payable on importation than in relation to the VAT payable on transactions within the country.

22 Consequently, the criminal penalties laid down by Article 414 of the Customs Code, which do not require fraudulent intent, must be compared with the fiscal penalties laid down by the Law of 8 July 1987, which likewise do not require fraudulent intent.

23 The comparison shows that the provision for confiscation of the goods in respect of which the offence was committed does not exist in the case of the corresponding internal offence. Furthermore, the fine which is automatically imposed in addition to confiscation is equivalent to the value of the undeclared goods or up to twice that amount whereas, in the case of the corresponding internal offence, it is proportionate to the amount of the tax evaded. The disproportion between the severity of the penalties applicable to offences concerning the VAT payable on importation, on the one hand, and those relating to the VAT payable on domestic transactions, on the other, is therefore manifest.

24 With regard to this complaint, the French Government adds that, for offences committed on the importation of vehicles, Article 350 of the Customs Code empowers the customs authorities to effect a compromise and that the amount payable as a result is similar to the fiscal penalties applicable to offences committed in the course of transactions within the country.

25 On this point it is sufficient to reply that that option, which is a matter for the discretion of the authorities, is not sufficient to remedy the failure to fulfil obligations arising from Article 414 of the Customs Code. As the Court has consistently held, the incompatibility of a national provision with the provisions of the Treaty can be remedied only by means of binding internal provisions (Case 239/85 Commission v Belgium [1986] ECR 3645, and Case 257/86 Commission v Italy [1988] ECR 3249).

26 Finally, the Commission' s second complaint must be examined. As already stated in paragraph 6, the Commission claims that Article 95 of the Treaty is also infringed by the fact that the fine laid down by Article 414 of the Customs Code does not take account of the residual portion of the VAT

which was paid in the Member State of exportation and is still incorporated in the value of the goods at the time of importation, so that such residual VAT still forms part of the taxable amount and is not deducted from the VAT payable on importation.

27 In that connection it must be emphasized that a system whereby the amount of the fine depends on the value of the goods fails ex hypothesi to take account of the residual portion of the VAT paid in the Member State of exportation.

28 Regard being had to the foregoing considerations, it must be declared that, by introducing and applying, under Article 414 of the French Customs Code, a system of penalties for offences concerning the VAT due upon importation from another Member State which is more severe than the system of penalties laid down elsewhere for offences concerning the payment of VAT on domestic transactions, the French Republic has failed to fulfil its obligations under Article 95 of the Treaty.

Decision on costs

Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Declares that by introducing and applying, under Article 414 of the French Customs Code, a system of penalties for offences concerning the VAT due upon importation from another Member State which is more severe than the system of penalties laid down elsewhere for offences concerning the payment of VAT on domestic transactions, the French Republic has failed to fulfil its obligations under Article 95 of the Treaty;

2. Orders the French Republic to pay the costs.