

Case C-492/08

European Commission

v

French Republic

(Failure of a Member State to fulfil obligations – Directive 2006/112/EC – Value added tax – Reduced rate – Articles 96 and 98(2) – Annex III, point 15 – Legal aid – Services of lawyers – Payment in full or in part by the State)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Member States' right to apply a reduced rate to certain supplies of goods or services

(Council Directive 2006/112, Arts 96 and 98(2), and Annex III, point 15)

A Member State that applies a reduced rate of value added tax to the supply of services by *avocats*, *avocats au Conseil d'État et à la Cour de cassation* and *avoués*, for which they are paid in full or in part by the State under the legal aid scheme, fails to fulfil its obligations under Articles 96 and 98(2) of Directive 2006/112 on the common system of value added tax.

In fact, point 15 of Annex III to Directive 2006/112, to which Article 98(2) thereof refers, permits Member States to apply a reduced rate of value added tax not to all supplies of services related to social wellbeing, but only to services provided by organisations that meet the dual requirement of being themselves devoted to social wellbeing and being engaged in welfare or social security work. Therefore, in order to comply with the wording of point 15, a Member State cannot apply a reduced rate of value added tax to supplies of services provided by private profit-making entities merely on the basis of an assessment of the nature of those services without taking into account, *inter alia*, the objectives pursued by those entities viewed as a whole and whether they are engaged in welfare work on a permanent basis.

In the light of its overall objectives and the fact that any engagement in welfare work is not permanent, the professional category of lawyers as a whole cannot be regarded as devoted to social wellbeing. Thus, even supposing that the services provided by lawyers under the legal aid scheme are related to social wellbeing and can be classified as 'engagement in welfare or social security work', that fact is not sufficient to conclude that those lawyers may be classified as 'organisations ... devoted to social wellbeing ... and engaged in welfare or social security work', within the meaning of point 15 of Annex III to Directive 2006/112.

(see paras 43, 45-47, 49, operative part)

JUDGMENT OF THE COURT (First Chamber)

17 June 2010 (*)

(Failure of a Member State to fulfil obligations – Directive 2006/112/EC – Value added tax – Reduced rate – Articles 96 and 98(2) – Annex III, point 15 – Legal aid – Services of lawyers – Payment in full or in part by the State)

In Case C-492/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 November 2008,

European Commission, represented by M. Afonso, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and J.-S. Pilczer, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of Chamber, A. Borg Barthet, M. Ilešić (Rapporteur), M. Safjan and M. Berger, Judges,

Advocate General: N. Jääskinen,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 February 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, in applying a reduced rate of value added tax ('VAT') to the supply of services by *avocats*, *avocats au Conseil d'État et à la Cour de cassation* and *avoués*, for which they are paid in full or in part by the State under the legal aid scheme, the French Republic has failed to fulfil its obligations under Articles 96 and 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

Legal context

European Union law

2 Directive 2006/112 recast 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 Sixth Directive'), which

was replaced with effect from 1 January 2007.

3 Article 96 of Directive 2006/112, which replaces the first sentence of the first subparagraph of Article 12(3)(a) of the Sixth Directive, provides:

‘Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.’

4 Article 97(1) of Directive 2006/112, which replaces the second sentence of the first subparagraph of Article 12(3)(a) of the Sixth Directive, provides that ‘[f]rom 1 January 2006 until 31 December 2010, the standard rate may not be less than 15%’.

5 Article 98(1) and (2) of Directive 2006/112, which corresponds to the third subparagraph of Article 12(3)(a) of the Sixth Directive, states:

‘1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

...’

6 Point 15 of Annex III to Directive 2006/112, headed ‘List of supplies of goods and services to which the reduced rates referred to in Article 98 may be applied’, refers to ‘supply of goods and services by organisations recognised as being devoted to social wellbeing [“ayant un caractère social”] by Member States and engaged in welfare or social security work, in so far as those transactions are not exempt pursuant to Articles 132, 135 and 136’. That provision corresponds to point 14 of Annex H to the Sixth Directive.

7 Article 132(1)(g) of Directive 2006/112, which replaces Article 13(A)(1)(g) of the Sixth Directive, provides, as one of the exemptions for certain activities in the public interest, an exemption for ‘the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people’s homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing’ [‘ayant un caractère social’].

National law

8 Article 279 of the French General Tax Code (code général des impôts, ‘the CGI’) provides:

‘... value added tax shall be charged at the reduced rate of 5.5% in respect of:

(f) services for which *avocats*, *avocats au Conseil d’État et à la Cour de cassation* and *avoués* are paid in full or in part by the State under the legal aid scheme;

...’

9 That provision has applied since 1 April 1991 and was introduced by Article 32 of the 1991 Finance Law (Law No 90-1168 of 29 December 1990), which made the supply of services by *avocats*, *avocats au Conseil d’État et à la Cour de cassation* and *avoués* subject to VAT.

Pre-litigation procedure

10 By letter of formal notice of 10 April 2006, the Commission informed the French Republic

that it considered that application of a reduced rate of VAT to the supply of services by *avocats*, *avocats au Conseil d'État et à la Cour de cassation* and *avoués* (together 'lawyers') under the legal aid scheme was incompatible with the provisions of Article 12(3)(a) of the Sixth Directive, in conjunction with those of Annex H to that directive.

11 In its reply of 12 July 2006, the French Republic invoked the objective of promoting access to justice for the least affluent and maintained that services provided by lawyers under the legal aid scheme are services covered by point 14 of Annex H to the Sixth Directive.

12 Not satisfied with that reply, the Commission sent a reasoned opinion to the French Republic by letter of 15 December 2006, requesting it to take the measures necessary to comply with the opinion within two months of receiving it.

13 By letter of 13 February 2007, the French Republic again stated its position that application of a reduced rate to the supply of services by lawyers under the legal aid scheme is consistent with the provisions of the Sixth Directive.

14 Since the Commission was not convinced by the French Republic's arguments it brought this action.

The action

Arguments of the parties

15 The Commission observes, as a preliminary point, that since the time-limit imposed on the French Republic for complying with the reasoned opinion expired after 1 January 2007, and thus after the Sixth Directive was repealed, the corresponding provisions of Directive 2006/112 should be applied in the context of this application.

16 Relying on Case C-83/99 *Commission v Spain* [2001] ECR I-445, paragraphs 19 and 20, the Commission maintains that Article 98(2) of, and Annex III to, Directive 2006/112, in so far as they permit Member States to derogate from the principle that the standard rate of VAT applies, must be interpreted strictly and in accordance with the usual meaning of the words in question. The services supplied by lawyers under the legal aid scheme, covered by Article 279(f) of the CGI, do not fall within any of the categories listed in Annex III to Directive 2006/112 and cannot in particular be equated to the 'supply of goods and services by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work', under point 15 of that annex.

17 In that regard, the Commission contends that application of point 15 is subject to two conditions: first, that the providers of services concerned must have a particular status and, secondly, that the services must be of a particular type.

18 With regard to the first condition, the Commission maintains that lawyers, although they may occasionally undertake work assisting recipients of legal aid, cannot be regarded on that basis as being 'organisations recognised as being devoted to social wellbeing'. Even though Directive 2006/112 does not lay down the conditions and procedure for recognising that status, it appears none the less to require a certain degree of permanence of the relationship between the Member State and the taxable person whose services attract the reduced rate. Application of the reduced rate in France in respect of certain services provided by lawyers is linked not to any permanence on the part of the service provider, but solely to the fact that the services concerned are provided under the legal aid scheme. The interpretation proposed by the French Republic in support of its contention that its national rules are compatible with that directive therefore amounts to applying

the exception provided for in point 15 of Annex III not only to service providers possessing a privileged status conferred by the State because they are devoted to social wellbeing, but to any taxable person, provided only that the services in question are paid for in full or in part by the State.

19 As regards the second condition, the Commission maintains that the services provided by lawyers under the legal aid scheme cannot be classified as 'engagement in welfare or social security work'. Those services consist in legal assistance and are the same as those offered to clients who do not receive aid from the State. The fact that the fee paid to the lawyer under the legal aid scheme is generally regarded as being inadequate makes no difference to the nature of the services provided by the lawyer. The Commission contends that the French Republic is wrong in maintaining that a lawyer who assists a recipient of legal aid is no longer performing the role of providing advice and defence but is performing a welfare role.

20 According to the Commission, the French Republic's interpretation amounts to replacing the condition relating to the nature of the services by another condition based on the recipients' lack of resources. It submits that adopting that interpretation would allow the reduced rate to be applied to all services providing support for the most disadvantaged persons. The Community legislature, however, deliberately chose to limit the cases in which reduced VAT rates would be applied by adopting an exhaustive list of supplies of goods and services that may be covered. Moreover, VAT, being a general tax on consumption, does not permit different rates of tax to be applied depending on the income levels of individual recipients of goods or services.

21 The Commission regards as unfounded, moreover, the French Republic's argument that application of the standard rate of VAT to services provided by lawyers would jeopardise access to justice for the most disadvantaged persons. In any event, it considers that pursuit of that objective is not a valid reason for failing to comply with the provisions of Directive 2006/112 that limit the application of reduced rates.

22 The French Republic contends that Article 279(f) of the CGI is compatible with Articles 96 and 98 of Directive 2006/112 since the services for which lawyers are paid in full or in part by the State under the legal aid scheme meet both the conditions laid down in point 15 of Annex III to that directive.

23 So far as the first condition is concerned, the French Republic maintains that lawyers providing services under the legal aid scheme are organisations recognised by France as being devoted to social wellbeing. In particular, it submits that it is appropriate to transpose in that regard the interpretation which the Court gave in Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427 of the same concept, 'organisations recognised as charitable' ['ayant un caractère social'], contained in Article 13(A)(1)(g) of the Sixth Directive, now Article 132(1)(g) of Directive 2006/112. According to that functional interpretation, the term 'organisation' is in principle sufficiently broad to include natural persons and private profit-making entities. Furthermore, since the Sixth Directive, just like Directive 2006/112, did not specify the conditions and procedures for recognising the charitable nature of the organisations at issue, the Court held that it is in principle for the national law of each Member State to lay down the rules according to which such recognition may be granted.

24 The French Republic maintains that Article 279(f) of the CGI meets the criteria which, according to the case-law of the Court, must be taken into consideration by the national authorities when deciding which organisations are devoted to social wellbeing, namely, the existence of specific legislative provisions, the public interest nature of the activities of the taxable person concerned, the fact that the other taxpayers providing the same services have similar recognition, and the fact that the costs of the services in question may be largely met by social security bodies.

Thus, the supply of services by lawyers under the legal aid scheme is the subject of specific fiscal provisions, those services constitute an activity in the public interest, all the lawyers providing those services have similar recognition and are covered by a similar scheme, and the costs of the services are met in part or in full by the State.

25 Moreover, the permanence of the link between the State and lawyers, assuming this to be a relevant criterion, is provided by the fact that the services in question are covered by Article 279(f) of the CGI. Also, although not all lawyers necessarily undertake legal aid work on a regular basis, any lawyer may at any time be assigned as a legal representative by a president of chamber or by a chairman of the bar and is required to undertake that assignment.

26 As regards the second condition, the French Republic submits that lawyers providing services under the legal aid scheme are engaged in welfare or social security work, since legal aid helps to ensure that the most disadvantaged persons have access to justice, which is recognised as a fundamental right *inter alia* under the third paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), as adapted at Strasbourg on 12 December 2007 (JO 2007 C 303, p. 1).

27 The French Republic proposes in that context a set of four indicators in the light of which it considers it possible to determine whether an organisation is engaged in welfare or social security work: the pursuit of a social objective for the benefit of disadvantaged persons, the implementation of a national solidarity policy through redistributive funding, the non profit-making nature of the services provided and the special constraints to which the service provider is subject.

28 As regards the last two indicators, in particular, the French Republic points out that legal aid is non profit-making, in so far as the flat-rate fee does not enable lawyers to cover the cost of their services. Furthermore, under the legal aid scheme a lawyer is subject to particular constraints since he is required to undertake assignments given him in that regard and thus to agree to provide for disadvantaged persons services that are paid for by the State at a level below cost.

29 The French Republic adds that taking into account the purpose and recipients of a service in order to classify it as 'welfare or social security work' is not irreconcilable with taking into account its nature and content. On the contrary, the classification of a service is often derived from a combination of its various elements. Thus, whether or not activities whose content and nature are identical should be regarded as welfare work should be decided according to the level of the recipients' resources.

30 Thus, it is necessary to distinguish the conventional work of a lawyer, for which fees are freely set, from the activity of a lawyer assisting a recipient of legal aid. Although the services provided in both cases are the same, the social purpose and the low income of the recipients combine to give the lawyer's legal aid services the nature of welfare work.

Findings of the Court

31 As a preliminary point, it should be recalled that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the initial version of a Community measure, subsequently amended or repealed, and which were maintained in force under the new provisions (Case C-275/04 *Commission v Belgium* [2006] ECR I-9883, paragraph 35, and judgment of 11 December 2008 in Case C-174/07 *Commission v Italy*, paragraph 31).

32 In the present case, it is common ground that the obligations under Articles 96 and 98(2) of Directive 2006/112 correspond to those applying before the entry into force of that directive under

Article 12(3)(a) of the Sixth Directive. Consequently, the Commission may plead, in the context of the present proceedings, the infringement alleged, although in the letter of formal notice and the reasoned opinion it took as its basis the corresponding provisions of the Sixth Directive, which was applicable at the time.

33 As regards the substance of this action, the parties disagree over whether the services provided by lawyers under the legal aid scheme, covered by Article 279(f) of the CGI, constitute services provided by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work, within the meaning of point 15 of Annex III to Directive 2006/112, with the result that the French Republic is permitted under Article 98(2) of that directive to apply a reduced rate of VAT to the supply of those services.

34 In the absence in Directive 2006/112 of a definition of the ‘supply of services by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work’ referred to in point 15 of Annex III, that concept should be interpreted in the light of its context within Directive 2006/112 (see, by analogy, *Commission v Spain*, paragraph 17, and Case C-3/09 *Erotic Center* [2010] ECR I-0000, paragraph 14).

35 In that regard, it follows from Article 98 of Directive 2006/112 that the application of either one or two reduced rates is an option accorded to the Member States as an exception to the principle that the standard rate applies. Furthermore, according to that provision, the reduced rates of VAT may be applied only to the supplies of goods and services specified in Annex III to that directive. It is settled case-law that provisions which are in the nature of exceptions to a principle must be interpreted strictly (see, inter alia, *Commission v Spain*, paragraphs 18 and 19 and case-law cited, and *Erotic Center*, paragraph 15).

36 Taking into account the objectives pursued by the legislature, the Court has already held in relation to the concept of ‘organismes reconnus comme ayant un caractère social par l’État membre concerné’ (‘organisations recognised as charitable by the Member State concerned’) under Article 13(A)(1)(g) of the Sixth Directive, corresponding to Article 132(1)(g) of Directive 2006/112 (‘bodies recognised by the Member State concerned as being devoted to social wellbeing’), that it is in principle sufficiently broad to include natural persons and private profit-making entities (see Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 17; Case C-144/00 *Hoffmann* [2003] ECR I-2921, paragraph 24; and *Kingscrest Associates and Montecello*, paragraphs 35 and 47).

37 Although the term ‘organisation’ suggests the existence of an individualised entity performing a particular function, there is nothing to prevent those conditions being satisfied by natural persons (see *Gregg*, paragraph 18, and *Hoffmann*, paragraph 24). Likewise, the pursuit of a profit-making aim, whilst it may be a relevant criterion to be taken into account in determining whether an organisation is charitable, by no means precludes it altogether from being charitable (see *Kingscrest Associates and Montecello*, paragraph 46).

38 There is no reason to depart from that analysis in relation to the category in point 15 of Annex III to Directive 2006/112. On the contrary, as the Advocate General stated in particular in point 84 of his Opinion, that analysis, which was adopted with regard to a provision concerning exemptions from VAT, is all the more appropriate with regard to Annex III concerning reductions in the rate of VAT.

39 It follows that, under the legal aid scheme, lawyers are not automatically excluded from the category in point 15 of Annex III to Directive 2006/112 solely because they are private profit-making entities.

40 However, in order to fall within that category, those lawyers must actually be recognised by Member States as being devoted to social wellbeing and engaged in welfare or social security work.

41 It is clear from case-law that Member States have a discretion to recognise certain organisations as being devoted to social wellbeing. However, that discretion must be exercised in accordance with Community law and, in particular, within the limits laid down in Directive 2006/112 (see, to that effect, Case C-141/00 *Kügler* [2002] ECR I?6833, paragraphs 54 to 57; *Kingscrest Associates and Montecello*, paragraphs 51 and 52; and Case C-415/04 *Stichting Kinderopvang Enschede* [2006] ECR I?1385, paragraph 23).

42 Those limits are exceeded in particular where a Member State recognises organisations as being devoted to social wellbeing in order to apply a reduced rate of VAT to certain services which they provide, in disregard of the actual wording of point 15 of Annex III to Directive 2006/112.

43 In that regard, it is clear from the wording of point 15 that it permits Member States to apply a reduced rate of VAT not to all supplies of services related to social wellbeing, but only to services provided by organisations which meet the dual requirement of being themselves devoted to social wellbeing and being engaged in welfare or social security work.

44 The intention of the European Union legislature to make the option of applying a reduced rate refer only to supplies of services provided by organisations meeting that dual requirement would be frustrated if a Member State were free to classify private profit-making entities as organisations within the meaning of point 15 merely because those entities provide inter alia services related to social wellbeing.

45 Therefore, in order to comply with the wording of point 15 of Annex III to Directive 2006/112, a Member State cannot apply a reduced rate of VAT to supplies of services provided by private profit-making entities merely on the basis of an assessment of the nature of those services without taking into account, inter alia, the objectives pursued by those entities viewed as a whole and whether they are engaged in welfare work on a permanent basis.

46 In the present case it must be stated that, in the light of its overall objectives and the fact that any engagement in welfare work is not permanent, the professional category of lawyers as a whole, as referred to in Article 279(f) of the CGI, cannot be regarded as devoted to social wellbeing.

47 Thus, even supposing that the services provided by lawyers under the legal aid scheme are related to social wellbeing and can be classified as 'engagement in welfare or social security work', that fact is not sufficient to conclude in this case that those lawyers may be classified as 'organisations ... devoted to social wellbeing ... and engaged in welfare or social security work', within the meaning of point 15 of Annex III to Directive 2006/112.

48 In those circumstances, the Commission's action must be held to be well founded.

49 It must therefore be held that, in applying a reduced rate of VAT to the supply of services by lawyers, for which they are paid in full or in part by the State under the legal aid scheme, the French Republic has failed to fulfil its obligations under Articles 96 and 98(2) of Directive 2006/112.

Costs

50 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 French Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, in applying a reduced rate of value added tax to the supply of services by *avocats*, *avocats au Conseil d'État et à la Cour de cassation* and *avoués*, for which they are paid in full or in part by the State under the legal aid scheme, the French Republic has failed to fulfil its obligations under Articles 96 and 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;**
2. **Orders the French Republic to pay the costs.**

[Signatures]

* Language of the case: French.