

JUDGMENT OF THE COURT (Sixth Chamber)

16 September 1999 \*

In Case C-414/97,

**Commission of the European Communities**, represented by Miguel Díaz-Llanos La Roche, Legal Adviser, and Carlos Gómez de la Cruz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of the latter, Wagner Centre, Kirchberg,

applicant,

v

**Kingdom of Spain**, represented by Nuria Díaz Abad, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

defendant,

APPLICATION for a declaration that, by exempting from value added tax intra-Community imports and acquisitions of arms, ammunition and equipment exclusively for military use, other than the aircraft and warships mentioned in points 23 and 25 of Annex F to Sixth Council Directive 77/388/EEC of 17 May

\* Language of the case: Spanish.

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), notwithstanding the provisions of Articles 2(2), 14, 28a and 28c(B) of that directive, the Kingdom of Spain has failed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch and J.L. Murray (Rapporteur), Judges,

Advocate General: A. Saggio,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 March 1999,

gives the following

### Judgment

- 1 By application lodged at the Court Registry on 5 December 1997, 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 exempting from value added tax (hereinafter 'VAT') intra-Community imports and acquisitions of arms, ammunition and equipment exclusively for military use, other than the aircraft and warships mentioned in points 23 and 25 of Annex F to 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, hereinafter 'the Sixth Directive'), notwithstanding the provisions of Articles 2(2), 14, 28a, and 28c(B) of that directive, the Kingdom of Spain has failed to fulfil its obligations under the EC Treaty.

- 2 Under the Sixth Directive, the following are subject to VAT:
  - the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such (Article 2(1));
  
  - the importation of goods (Article 2(2));
  
  - intra-Community acquisitions of goods (Article 28a inserted by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1)).
  
- 3 Article 14 of the Sixth Directive lists exemptions on importation. Article 28c(B) (inserted by Directive 91/680) lists exempt intra-Community acquisitions of goods.

- 4 Under the provisions of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter 'the Act of Accession'), the Sixth Directive is applicable to Spain, with the exception of the Canary Isles, Ceuta and Melilla.
  
- 5 Under Law No 6/87 of 14 May 1987 concerning budgetary appropriations for investments and operating costs of the armed forces (BOE of 19 May 1987, hereinafter 'the Spanish Law'), imports into Spain of products from other Member States, including supplies of armaments, munitions and equipment exclusively for military use are exempt from VAT with retrospective effect from 1 January 1986.
  
- 6 Under the Spanish Law, the Kingdom of Spain does not impose VAT on certain intra-Community imports and acquisitions of goods, which, according to the Commission, should be subject to it since no exemption is provided for either by Articles 14 and 28c of the Sixth Directive or by the Act of Accession.
  
- 7 Taking the view that this exemption was contrary to Article 2(2) of the Sixth Directive, the Commission, by letter of 7 February 1990, gave the Spanish Government formal notice to submit its observations within two months.
  
- 8 The Spanish authorities replied by letter of 7 May 1990. The Commission none the less considered that, despite the arguments raised by the Spanish authorities, the introduction of the exemption at issue into the Spanish legal order constituted an infringement of the provisions of the Sixth Directive.
  
- 9 Having found, however, that since 1 January 1993 the Kingdom of Spain was entitled, under Directive 91/680, to exempt from VAT certain transactions

relating to aircraft and warships mentioned in points 23 and 25 of Annex F to the Sixth Directive, the Commission took the view that, although the Kingdom of Spain had infringed that directive as regards military equipment until 1 January 1993, that infringement ceased thereafter in respect of the equipment mentioned in points 23 and 25 of that annex.

- 10 On 6 August 1996, the Commission sent the Kingdom of Spain a reasoned opinion calling on it to take the necessary measures to comply therewith within two months of its notification.
- 11 By letter of 16 June 1997, the Kingdom of Spain replied to that opinion, essentially reiterating its position.
- 12 In the light of the evidence furnished by the Spanish authorities, the Commission, taking the view that the Kingdom of Spain had not complied with the reasoned opinion, brought this action.
- 13 The Commission argues that, under the Sixth Directive, all intra-Community imports and acquisitions of goods are subject to VAT. There are three situations in which there is no VAT liability: first, in the case of the exemptions listed exhaustively in Articles 14 or 28c of the Sixth Directive; second, in cases covered by Article 28(3) of that directive, which allows a temporary exemption to be applied during the transitional period mentioned in Article 28(4); and, finally, in cases where an exemption is provided for by the Act of Accession.
- 14 The Commission maintains that Articles 14 and 28c contain a list of the exemptions which the Member States must — or may — allow. In its view, no

exemption relating to armaments, munitions or equipment exclusively for military use, such as that provided for by the Spanish Law, appears in that list.

- 15 The Commission takes the view that the Act of Accession required the Kingdom of Spain to bring into force the measures necessary to comply with directives from the time of its accession. It points out that the Kingdom of Spain introduced VAT by Law No 30/85 of 2 August 1985 (BOE of 9 August 1985), which took effect on 1 January 1986.
  
- 16 The Commission considers that, at the time of the introduction of VAT, the Kingdom of Spain had thus made provision for the imposition of the tax on all intra-Community imports or acquisitions of military equipment and that the exemption of such transactions was only decided on more than a year later with retrospective effect from the date on which VAT was first levied in Spain.
  
- 17 The Kingdom of Spain submits that its national legislation complies with Community law, and, in particular, with Article 223(1)(b) of the EC Treaty (now, after amendment, Article 296(1)(b) EC), which provides for a safeguard clause whereby Member States may take the measures they consider necessary for the protection of the essential interests of their security which are connected with the production of or trade in arms, munitions and war material. It notes that the Spanish Law, extended by Law No 9/90, must be understood as having been adopted on the basis of that article, since exemption from VAT constitutes a necessary measure for the purposes of guaranteeing the achievement of the essential objectives of its overall strategic plan and, in particular, to ensure the

effectiveness of the Spanish armed forces both in national defence and as part of the North Atlantic Treaty Organisation.

- 18 As a preliminary matter, the Commission observes that the plea raised by the Kingdom of Spain in its defence is out of time since it was not advanced at any time during the pre-litigation procedure. It points out that, according to the case-law of the Court, the allegations made by the Commission against a Member State must be the same during the different stages of the procedure, the Commission being entitled only to add further details in support of its argument. The Commission submits that such a requirement is applicable *mutatis mutandis* in this case.
- 19 In that connection, suffice it to note that such a requirement would be contrary to the general principle of respect for the rights of the defence. According to the case-law of the Court, the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see the order of 11 July 1995 in Case C-266/94 *Commission v Spain* [1995] ECR I-1975, paragraph 17). Thus, once the subject-matter has been defined, the Member State has the right to raise all the pleas available to it in order to defend itself. Moreover, there is no rule of procedure which requires the Member State concerned to put forward, during the pre-litigation procedure, all the arguments in its defence, in an application based on Article 169 of the EC Treaty.
- 20 The Commission takes the view that, in so far as it constitutes an exception to the rule regarding VAT liability, the measure which the Kingdom of Spain adopted purportedly because it was 'necessary', on the basis of the safeguard clause in Article 223(1)(b) of the Treaty, must be interpreted strictly. The Commission argues that it was for the Kingdom of Spain to establish to what extent VAT liability could affect the essential interests of its national security. It cites case-law of the Court according to which a Member State may not plead provisions,

practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive.

- 21 It must be observed in that regard, as the Court has already held in Case 222/84 *Johnston* [1986] ECR 1651, paragraph 26, that the only articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 of the EC Treaty (now, after amendment, Articles 30 EC, 39 EC, 46 EC, 296 EC and 297 EC), which deal with exceptional and clearly defined cases. Because of their limited character, those articles do not lend themselves to a wide interpretation.
- 22 Accordingly, it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases. In the present case, the Kingdom of Spain has not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security. It is clear from the preamble to that Law that its principal objective is to determine and allocate the financial resources for the reinforcement and modernisation of the Spanish armed forces by laying the economic and financial basis for its overall strategic plan. It follows that the VAT exemptions are not necessary in order to achieve the objective of protecting the essential interests of the security of the Kingdom of Spain.
- 23 Furthermore, as the Advocate General pointed out at point 12 of his Opinion, the imposition of VAT on imports and acquisitions of armaments would not compromise that objective since the income from payments of VAT on the



transactions in question would flow into the State's coffers apart from a small percentage which would be diverted to the Community as own resources.

- 24 Consequently, it must be held that the Spanish Government has not established that the abolition of the exemption from VAT on imports and acquisitions of armaments, munitions and equipment exclusively for military use, provided for by the Spanish Law, constituted a measure which would undermine the protection of the essential interests of the security of the Kingdom of Spain and that those exemptions were therefore justified under Article 223(1)(b) of the Treaty.
- 25 To justify the exemptions provided for by the Spanish Law, the Kingdom of Spain refers, further, to Article 28(3)(b) of the Sixth Directive, which allows Member States to continue to exempt, during a transitional period, the activities set out in Annex F, including, in paragraphs 23 and 25, 'the supply, modification, repair, maintenance, chartering and hiring of aircraft, including equipment incorporated or used therein, used by State institutions', and 'the supply, modification, repair, maintenance, chartering and hiring of warships'.
- 26 According to the Kingdom of Spain, Article 28(3) of the Sixth Directive does not govern the transitional arrangements applicable to Member States which joined the Community after 31 December 1977. However, it considers that it would be inequitable to treat new Member States acceding to the European Communities less favourably than those which were already members on that date, so that the new Member States can also exercise the rights conferred by Article 28 of the

Sixth Directive from the time of their accession to the Community even though that right is not expressly provided for in the Act of Accession.

- 27 The Kingdom of Spain observes that Article 9 of Law No 44/82 of 7 July 1982 on budgetary appropriations for investments and operating costs of the armed forces (BOE of 21 July 1982) exempted from equalisation tax imports of every type of equipment necessary for the investment plan of the Spanish armed forces. It points out that this tax disappeared when VAT was introduced and was absorbed by VAT following the accession of the Kingdom of Spain to the Communities. Therefore, it considers that the exemption at issue was in existence at the time of its accession and could be maintained on the basis of Article 28 of the Sixth Directive.
- 28 On the other hand, the Commission takes the view that equalisation tax disappeared with the introduction of VAT by Law No 30/85 which took effect on 1 January 1986, the date of the accession of the Kingdom of Spain to the European Communities. From that, the Commission therefore concludes that, at the time of the introduction of VAT, the Kingdom of Spain provided for the imposition of the tax on all intra-Community imports or acquisitions of military equipment. The Commission asserts that the exemption of such transactions was decided on subsequently by the Kingdom of Spain in the Spanish Law (but with retrospective effect from 1 January 1986).
- 29 In that regard, suffice it to note that, according to the case-law of the Court (Case C-35/90 *Commission v Spain* [1991] ECR I-5073, paragraph 7), since the Kingdom of Spain subjected supplies of armaments, munitions and equipment exclusively for military use from other Member States to the general scheme of VAT by means of Law No 30/85 which entered into force on 1 January 1986, it

could no longer subsequently claim the right to continue to exempt those activities pursuant to Article 28(3)(b) of the Sixth Directive.

- 30 Furthermore, a retrospective exemption of the kind provided for by the Spanish legislation would be contrary to the purpose of the relevant Community provisions. It is settled case-law that the very wording of Article 28(3)(b) of the Sixth Directive precludes the introduction of new exemptions (Case 73/85 *Kerrutt* [1986] ECR 2219, paragraph 17, and Case C-74/91 *Commission v Germany* [1992] ECR I-5437, paragraph 15).
- 31 As regards the scope of Article 28(3a) inserted by Directive 91/680 which authorises the Kingdom of Spain to exempt from VAT the activities set out in paragraphs 23 and 25 of Annex F, it must be observed that this exemption, being an exception, is to be interpreted strictly (see Case C-35/90 *Commission v Spain*, cited above, paragraph 9) and only partially remedies the failure by the Kingdom of Spain to fulfil its obligations. First, the failure persisted in its entirety until 1 January 1993, the date of the entry into force of Directive 91/680, and second, the derogation provided for by that directive only concerned aircraft and warships.
- 32 Accordingly, it must be held that, by exempting intra-Community imports and acquisitions of arms, ammunition and equipment exclusively for military use, other than the aircraft and warships mentioned in points 23 and 25 of Annex F to the Sixth Directive from VAT, notwithstanding the provisions of Articles 2(2), 14, 28a, and 28c(B) of that directive, the Kingdom of Spain has failed to fulfil its obligations under that directive.

## Costs

- 33 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 to be awarded against it, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Declares that, by exempting from value added tax intra-Community imports and acquisitions of arms, ammunition and equipment exclusively for military use, other than the aircraft and warships mentioned in points 23 and 25 of Annex F to 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, in the version resulting from Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers, notwithstanding the provisions of Articles 2(2), 14, 28a, and 28c(B) of that directive, the Kingdom of Spain has failed to fulfil its obligations under that directive;

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

Kapteyn

Hirsch

Murray

Delivered in open court in Luxembourg on 16 September 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber