

JUDGMENT OF THE COURT (First Chamber)

6 May 2010*

In Case C-94/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 March 2009,

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,

* Language of the case: French.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, E. Levits, A. Borg Barthet, J.-J. Kasel and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by failing to apply a single rate of value added tax ('VAT') generally to the supply of services by undertakers, and to the related supplies of goods, the

French Republic has failed to fulfil its obligations under Articles 96 to 99(1) 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

The European Union legislation

- 2 Directive 2006/112 repeals and replaces, from 1 January 2007, 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; ‘the Sixth Directive’).

- 3 Article 96 of Directive 2006/112, corresponding to 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 98(1) and (2) of Directive 2006/112, corresponding to the third subparagraph of Article 12(3)(a) of the Sixth Directive, provides:

‘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.

...’

5 Annex III to Directive 2006/112, corresponding to Annex H to the Sixth Directive, contains a list of activities, including the following two categories:

‘(5) transport of passengers and their accompanying luggage;

...

(16) supply of services by undertakers and cremation services, and the supply of goods related thereto.’

National legislation

- 6 Article L.2223-19 of the General Local Authorities Code (Code général des collectivités territoriales) defines the external services for funerals as follows:

“The external services for funerals are a public service task including:

- 1 The transportation of the body before and after it has been placed in the coffin;
- 2 The organisation of funerals;
- 3 Embalming;
- 4 The provision of covers, coffins and their internal and external accessories and of funeral urns;
- 5 Subparagraph deleted

- 6 The management and use of funeral homes;

- 7 The provision of hearses and conveyances for mourners;

- 8 The provision of staff and the objects and supplies necessary for funerals, burials, exhumations and cremations, with the exception of funeral plaques, religious emblems, flowers, various types of printed matter and monumental marblework.

...'

- 7 As regards the rate of VAT applicable to funeral supplies, Ministerial Instruction No 68 of 14 April 2005 (*Bulletin officiel des impôts* 3 C-3-05) provides:

‘...

Only the transportation of the body, before and after it has been placed in the coffin, performed by approved service providers by means of vehicles specially equipped for that purpose is subject to the reduced rate. The same applies, where appropriate, to the transport of passengers in cars following the hearse or in cars of the clergy.

All other operations which may be carried out by those service-providers in the context of the external services for funerals or other related activities are subject to the applicable rate, that is, in principle, the standard rate.

...'

8 Article 279 of the General Tax Code (Code général des impôts) provides:

'[VAT] is levied at the reduced rate of 5.50 % as regards:

...

b *quater*. passenger transport;

...'

Pre-litigation procedure

- 9 By letter of 15 December 2006, the Commission drew to the attention of the French Republic the fact that certain national provisions relating to the rate of VAT applicable to the supply of services by undertakers did not seem to comply with European Union law, and called on that Member State to submit its observations under Article 226 EC.
- 10 In its reply of 14 February 2007, the French Republic stated that its national legislation on VAT was compatible with European Union law.
- 11 Since it was not convinced by that reply, the Commission, on 29 June 2007, issued a reasoned opinion in which it called on the French Republic to take the measures required to comply with it within two months of the date of receipt.
- 12 By letter of 24 August 2007, the French Republic reiterated its position.
- 13 Since the Commission was not convinced by the arguments of the French Republic, it decided to bring the present action.

The action

Arguments of the parties

- 14 The Commission submits that all the supplies of services and of goods by undertakers to the families of deceased persons constitute, for the purposes of VAT, a single complex transaction which must, consequently, be subject to a single rate of tax.
- 15 The Commission bases its position on the case-law of the Court according to which a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system (Case C-349/96 *CPP* [1999] ECR I-973, paragraph 29, and Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 20). The Commission takes the view that the organisation of a funeral, which the family of the deceased person requests the undertaker to perform, is characterised by a bundle of elements and acts which must be considered to be a single complex supply in so far as, for a typical consumer, they are so closely linked that they form, objectively, from an economic point of view, a whole which it would be artificial to split.
- 16 According to the Commission, artificially splitting the service of transporting a body by vehicle from the whole consisting of the supply of services by undertakers, as follows from Ministerial Instruction No 68 of 14 April 2005, leads the French Republic to apply two different rates of VAT to two components of a supply which must be regarded as a single supply. That supply is thus subject to an effective rate of taxation which corresponds to an average rate which is bound to be lower than the standard rate applicable in France. In addition, that rate will tend to vary from transaction to transaction, according to the relative importance of the transportation of the body

by vehicle in each case. The Commission takes the view that the French legislation therefore infringes Article 98(1) of Directive 2006/112.

- 17 The Commission adds that the different treatment of the service involving transportation of a body by vehicle renders matters more complex and confusing for the consumer and competitors, which is liable to distort competition and therefore to infringe the principle of fiscal neutrality inherent in the common system of VAT.
- 18 The French Republic in essence claims that the case-law on which the Commission relies is not relevant in the present case and that, so far as the categories of supply in Annex III to Directive 2006/112 are concerned, the Member States have the option to apply the reduced rate selectively.
- 19 The French Republic bases its position on Case C-384/01 *Commission v France* [2003] ECR I-4395, paragraphs 22 and 23, relating to the supply of electricity and natural gas, and Case C-442/05 *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-1817, paragraph 39, relating to water supplies. It submits that it is apparent by analogy from those judgments that there is nothing in the text of Articles 96 to 99(1) of Directive 2006/112 which requires those provisions to be interpreted as meaning that the reduced rate can be charged only if it is applied to all aspects of the supply of services by undertakers falling within Annex III to that Directive, so that a selective application of a reduced rate cannot be excluded, provided that no risk of distortion of competition results.
- 20 With reference to the abovementioned judgments, it also claims that, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of the supply of services by undertakers. The French Republic considers that those conditions are fulfilled as regards the transportation of a body by vehicle. First, it is a

concrete and specific aspect of the supply of services by undertakers, which is shown by the fact that that transaction is the subject of specific legislation. Secondly, the application of the reduced rate to only the transportation of a body by vehicle does not prejudice the principle of fiscal neutrality since that supply is not in competition with any other.

Findings of the Court

The interpretation of Articles 96 to 99(1) of Directive 2006/112

- ²¹ Article 96 of Directive 2006/112 provides that the same rate of VAT, the standard rate, is applicable to supplies of goods and supplies of services.
- ²² Article 98(1) and (2) of that directive then grants Member States, as an exception to the principle that the standard rate is applicable, the possibility to apply one or two reduced rates of VAT. According to that provision, the reduced rates of VAT are to be applied only to supplies of goods or services in the categories set out in Annex III to that directive.
- ²³ Annex III, point 16, to Directive 2006/112 authorises the application of a reduced rate to the supply of services by undertakers.

- 24 The rules defined by those provisions are, in essence, identical to those set out in Article 12(3)(a), first and third subparagraphs, of the Sixth Directive and in Annex H, fifteenth category, thereto.
- 25 The Court has held, as regards Article 12(3)(a), third subparagraph, of the Sixth Directive, that there is nothing in the text of that provision which requires that it be interpreted as meaning that the reduced rate can be charged only if it is applied to all aspects of a category of supply covered by Annex H to that directive, so that a selective application of the reduced rate cannot be excluded provided that no risk of distortion of competition results (see *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*, paragraph 41, and, by analogy, *Commission v France*, paragraph 27).
- 26 The Court has inferred that, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of a category of supply covered by Annex H to the Sixth Directive (see *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*, paragraph 43).
- 27 Since Article 98(1) and (2) of Directive 2006/112 in essence repeats the wording of Article 12(3)(a) of the Sixth Directive, the interpretation given by the Court to the earlier provision should be extended to the provision replacing it.
- 28 It follows that, where a Member State decides to make use of the possibility given by Article 98(1) and (2) of Directive 2006/112 to apply a reduced rate of VAT to a category of supply in Annex III to that directive, it has, subject to the requirement to observe the principle of fiscal neutrality inherent in the common system of VAT, the possibility of limiting the application of that reduced rate of VAT to concrete and specific aspects of that category.

- 29 The possibility thus granted to Member States of applying the reduced rate of VAT selectively is justified, *inter alia*, by the fact that, since that rate is the exception, the restriction of its application to concrete and specific aspects is consistent with the principle that exemptions or derogations must be interpreted restrictively (*Commission v France*, paragraph 28).
- 30 However, it must be pointed out that the exercise of that possibility is subject to the twofold condition, first, to isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply at issue and, secondly, to comply with the principle of fiscal neutrality. Those conditions seek to ensure that the Member States make use of that possibility only under conditions ensuring the correct and straightforward application of the reduced rate chosen and the prevention of any possible evasion, avoidance or abuse.
- 31 The Commission maintains that the Member States, when they make use of the possibility available to them under Article 98 of Directive 2006/112 to apply a reduced rate of VAT, must comply with the criteria identified by case-law in order to determine whether a transaction including several elements must be considered to be a single supply, subject to the same tax treatment, or to be two or more separate supplies, which may be treated differently.
- 32 In this connection, it must be recalled that those criteria, such as the expectations of a typical consumer, to which the Commission refers, are intended to protect the functioning of the VAT system in the light of the diversity of commercial operations. However, the Court itself has acknowledged that it is impossible to give exhaustive guidance on that issue (*CPP*, paragraph 27) and pointed out that it is necessary to take into account all the circumstances in which the transaction at issue takes place (*CPP*, paragraph 28; *Levob Verzekeringen and OV Bank*, paragraph 19, and Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 54).

- 33 It follows that, while those criteria may be applied on a case-by-case basis, in order to prevent, inter alia, the contractual structure put in place by the taxable person and the consumer from leading to an artificial splitting into a number of fiscal transactions of a transaction which, from an economic point of view, must be regarded as a single transaction, they cannot be regarded as decisive for the purpose of the exercise by the Member States of the discretion left to them by Directive 2006/112 as regards the application of the reduced rate of VAT. The exercise of such discretion requires general and objective criteria, such as those identified in *Commission v France* and *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* and reiterated in paragraphs 26, 28 and 30 of this judgment.
- 34 Accordingly, in order to rule on the merits of this action, it is not necessary to examine whether, as the Commission maintains, the supply of services by undertakers must be regarded as a single transaction from the point of view of the expectations of a typical consumer. On the other hand, it is necessary to ascertain whether the transportation of a body by vehicle, in respect of which the French legislation provides for the application of a reduced rate of VAT, constitutes a concrete and specific aspect of that category of supply, as set out in Annex III, point 16, to Directive 2006/112, and, if so, to examine whether or not the application of that rate undermines the principle of fiscal neutrality.

The classification of the transportation of a body by vehicle as a ‘concrete and specific aspect’ of the supply of services by undertakers

- 35 In order to answer the question whether the transportation of a body by vehicle constitutes a concrete and specific aspect of the supply of services by undertakers, it is necessary to consider whether it entails a service which is, as such, separately identifiable from the other services provided by those firms.

- 36 In this connection, it must be stated that the transportation of a body by vehicle, as a transport activity, can be distinguished from the other services which may be provided by undertakers. These are services pertaining to the body, the use of a funeral home, the organisation of funerals and burial or cremation.
- 37 It may also be distinguished from the carriage of a body by bearers, in so far as the latter activity, which is restricted to short journeys by its very nature, is not necessarily carried out by a firm but may be entrusted to the deceased's close relatives and is above all ceremonial in character.
- 38 In addition, according to the information provided by the French Republic and not contradicted by the Commission, the transportation of a body by vehicle is governed in France by specific legislation, in so far as it may be carried out only by approved service providers by means of vehicles specially equipped for that purpose. As the French Republic submitted, the transportation of the body may indeed be carried out by an approved carrier irrespective of any funeral services.
- 39 Accordingly, it must be held that the transportation of a body by vehicle constitutes a concrete and specific element in the supply of services by undertakers.

The observance of the principle of fiscal neutrality

- 40 As regards the issue of whether the application of a reduced rate to the transportation of a body by vehicle undermines the principle of fiscal neutrality inherent in the common system of VAT, that principle precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes

(see, inter alia, *Commission v France*, paragraph 25, and *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*, paragraph 42).

- 41 As was held in paragraph 37 of this judgment, the transportation of a body by vehicle can be distinguished from the carriage of a body by bearers, so that they are not similar supplies of services which are in competition with one another.
- 42 Moreover, the French Republic submitted, without being contradicted on that point by the Commission, that, when the transportation of a body by vehicle is carried out in isolation, that is, irrespective of any other funeral service, by undertakers or by any other approved service provider, such as an undertaking providing ambulance services, that transaction, according to the French legislation, is regarded as transport of passengers within the meaning of Annex III, point 5, to Directive 2006/112 and, in accordance with Article 279 of the General Tax Code, subject to the same reduced rate as if it had been carried out under a contract including the provision of a wider range of funeral services. It follows that similar supplies involving transportation of a body by vehicle, which may be in competition with one another, are not treated differently for VAT purposes.
- 43 The Commission submits that the different treatment of supplies involving transportation of a body by vehicle is liable to distort competition in so far as undertakers may be tempted to increase artificially that part of the price which they make correspond to the transportation of a body by vehicle, so as to reduce the part of the price of the other supplies which will be subject to the standard rate.

- 44 In this connection, the Commission has not expressly stated how such practices, which it has not established to exist, would be liable to distort competition between service providers. It must be added that, should practices such as those to which the Commission refers be proven, it would be for the competent national authorities, who have the task of ensuring the correct and straightforward application of the reduced rate they have chosen and the prevention of any possible evasion, avoidance or abuse (see paragraph 30 of this judgment), to examine whether those practices may be considered to be an abusive practice by referring, if necessary, to the criteria developed to this effect by the Court's case-law (see, *inter alia*, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 74 to 76).
- 45 It follows that the Commission has not shown that the application of a reduced rate to the transportation of a body by vehicle is liable to infringe the principle of fiscal neutrality inherent in the common system of VAT.
- 46 In the light of the foregoing, it must be held that the French legislation making the transportation of a body by vehicle subject to a reduced rate of VAT fulfils the conditions required by the relevant European Union legislation.
- 47 Accordingly, the action must be dismissed.

Costs

- 48 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 French Republic has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

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

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs.**

[Signatures]