JUDGMENT OF THE COURT
16 December 1986 *

In Case 200/85

Commission of the European Communities, represented by Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that, by introducing and maintaining differential rates of value-added tax on diesel-engined cars on the basis of cubic capacity in such a way that the higher rate applies exclusively to imported cars, and in particular to those imported from other Member States, the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty,

THE COURT

composed of: C. Kakouris, President of Chamber, acting as President, T. F. O'Higgins and F. Schockweiler, Presidents of Chambers, G. Bosco, T. Koopmans, K. Bahlmann and J. C. Rodríguez Iglesias, Judges,

Advocate General: J. Mischo
Registrar: P. Heim

having regard to the Report for the Hearing as amended and further to the hearing on 18 September 1986,

* Language of the Case: Italian.

after hearing the Opinion of the Advocate General delivered at the sitting on 1 October 1986,

gives the following

JUDGMENT

1 By an application received at the Court Registry on 1 July 1985 the Commission of the European Communities brought an action pursuant to Article 169 of the EEC Treaty for a declaration that, by introducing and maintaining differential rates of value-added tax on diesel-engined cars on the basis of cubic capacity in such a way that the higher rate applies exclusively to imported cars, and in particular to cars imported from other Member States, the Italian Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty.

2 Reference is made to the Report for the Hearing for the relevant Italian provisions and the submissions and arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I — Admissibility

3 The Italian Government points out that in its reasoned opinion the Commission charged the Italian Republic with having infringed the first paragraph of Article 95 of the EEC Treaty, whereas in the application it seeks a declaration that the Italian Government has failed to fulfil its obligations under Article 95. A clarification made by the Commission in its reply shows that its complaints relate to an alleged failure to comply with the second paragraph of Article 95. Consequently, the application should be declared to be inadmissible.

4 It must be observed, in the first place, that whereas the concluding paragraphs of the reasoned opinion do, in fact, refer to a failure to fulfil the first paragraph of Article 95, the second paragraph of that article is nevertheless expressly mentioned twice and, in the second place, the reasoned opinion relates to the protectionist nature of the contested Italian legislation. Consequently, considered as a whole, the reasoned opinion refers to both the first and the second paragraphs of Article 95.

5 Consequently, the subject-matter of the dispute has not been amended in the course of the procedure in such a way as to render the application inadmissible.

6 The objection of inadmissibility raised by the Italian Government must therefore be dismissed.

II — The substance

7 The Commission's complaint relates to the differential tax arrangements for diesel cars resulting from the amendment introduced by the Decree-Law of 26 May 1978 which was converted into Law No 388 of 24 July 1978. Whereas before all cars of a cubic capacity not exceeding 2 000 cc were subject to the normal rate of value-added tax and the higher rate was applied to cars with a cubic capacity of more than 2 000 cc, that amendment raised the threshold beyond which diesel-engined cars are subject to the higher rate from 2 000 to 2 500 cc which, in the Commission's view, results in the higher rate being charged on imported cars only.

8 Before considering the compatibility of that system with Article 95 of the EEC Treaty, it is appropriate to point out that the Court has consistently held that in its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria. However, the freedom left to Member States in the field of domestic taxation cannot justify any departure from the fundamental principle of non-discrimination in taxation matters laid down in Article 95 but must be exercised within the confines of that provision and observe the prohibitions contained therein.

9 Accordingly, in order to decide whether the contested differential tax arrangements are compatible with Article 95 of the Treaty it must be considered whether the differentiation is based on an objective criterion, whether it is directly or indirectly discriminatory and whether it is of such a nature as to protect domestic products from competing products imported from other Member States.

10 In this case, it must be held in the first place that reference to a particular cubic capacity as the differential threshold between two rates of taxation is an objective criterion that takes no account of the origin of products. The fact that the differential threshold is higher for diesel-engined cars than for petrol-engined cars is not itself contested in these proceedings.

11 Nevertheless, the Commission argues that in view of their intrinsic characteristics diesel-engined cars, and even those of large cubic capacity, cannot be regarded as luxury products warranting the application of a higher rate. This is contested by the Italian Government.

12 In that connection, it is sufficient to observe, first, that the charging of a higher rate of value-added tax on certain products because they are classified as luxury products is an aspect of the Italian tax system which the Court has already held to be compatible with the Treaty (judgment of 15 March 1983 in Case 319/81 *Commission* v *Italian Republic* [1983] ECR 601) and, secondly, that in this case the application of that criterion to cars whose cubic capacity exceeds a certain figure is not arbitrary or unreasonable.

13 Furthermore, the Commission admits that it would not have challenged the system if there had been diesel-engined cars of Italian manufacture falling into the category subject to the higher rate of taxation.

14 It points out that in this case the threshold laid down results in only imported cars being subject to the higher rate.

15 That finding is indeed true of diesel cars. However, it appears from the documents before the Court that as a result of the aforementioned amendment to the Italian legislation most models of diesel-engined cars imported from other Member States of the Community fall within the category of cars taxed at the normal rate of value-added tax, whereas only one model falls within the category of cars taxed at the higher rate.

16 Moreover, it is common ground that if regard is had not only to diesel-engined cars but to motor cars as a whole, it is clear that the higher rate of value-added tax is levied not only on imported cars but also on cars of Italian manufacture.

17 In those circumstances the differential tax arrangements in question apply equally to domestic and imported products and cannot be regarded as discriminatory.

18 It remains to be considered whether the contested differential tax arrangements are of such a nature as to protect domestic products from competing imported products.

19 The Commission observes that the Italian legislation was amended at the very time when Italian industry was about to market a diesel-engined car of a cubic capacity of slightly less than 2 500 cc. The differential threshold was therefore fixed so as to exclude that national product from the application of the higher rate. The protectionist aim of the provision in question is thus manifest.

20 Account must be taken of the fact that it is uncontested that the amendment in question benefited not only certain Italian models but also a large number of models imported from other Member States of the Community. Moreover, the competitive relationship which must be taken into consideration in order to assess whether a protective effect exists cannot be limited to diesel-engined cars but must extend to all cars whether they are diesel- or petrol-engined.

21 It is common ground that the higher rate also affects Italian-made petrol-engined cars. This being so, the protectionist nature of the contested tax legislation has not been made out.

22 Lastly, the Commission cites in support of its argument the Court's judgment of 9 May 1985 in Case 112/84 *Humblot* v *Directeur des services fiscaux* [1985] ECR 1367, and maintains that the principles laid down therein may be applied to this case.

23 In that judgment the Court ruled that 'Article 95 of the EEC Treaty prohibits the charging on cars exceeding a given power rating for tax purposes of a special fixed tax the amount of which is several times the highest amount of the progressive tax payable on cars of less than the said power rating for tax purposes, where the only cars subject to the special tax are imported, in particular from other Member States'.

24 However, it is clear from the foregoing that the differential tax arrangements contested in this case form part of a general system of taxation and also that they relate not only to imported products but also to domestic products.

25 It follows that the application must be dismissed.

III — Costs

26 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the Commission to pay the costs.

Kakouris O'Higgins Schockweiler

Bosco Koopmans Bahlmann Rodríguez Iglesias

Delivered in open court in Luxembourg on 16 December 1986.

P. Heim
Registrar

C. Kakouris
President of Chamber
acting as President