JUDGMENT OF THE COURT
23 May 1990 *

In Case C-251/88

Commission of the European Communities, represented by John Forman and Götz zur Hausen, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Jochim Sedemund, Rechtsanwalt, Cologne, acting as Agent, with an address for service in Luxembourg at the German Embassy, 20-22, avenue Emile-Reuter,

defendant,

APPLICATION for a declaration that by failing to calculate correctly the basis of assessment for certain VAT own resources, by failing to make some of the Communities' own resources available to the Commission within the stipulated periods and by refusing to pay the interest due in respect of the delay in making the corresponding entries, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

* Language of the case: German.

THE COURT

composed of: O. Due, President, F. A. Schockweiler (President of Chamber), G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General: F. G. Jacobs
Registrar: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing and further to the hearing on 30 January 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 February 1990,

gives the following

Judgment

1 By an application lodged at the Court Registry on 15 September 1988, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by failing to calculate correctly the basis of assessment for certain own resources accruing from value-added tax (hereinafter referred to as 'VAT'), by failing to make some of the Communities' own resources available to the Commission within the stipulated periods and by refusing to pay the interest due in respect of the delay in making the corresponding entries, the Federal Republic of Germany has failed to fulfil its obligations under the Treaty.

2 The Communities' own resources accruing from value-added tax (hereinafter referred to as 'VAT own resources') are calculated through the application of the Community rate, as fixed in the budgetary procedure, to a base which must be determined in accordance with Council Regulation (EEC, Euratom, ECSC) No 2892/77 of 19 December 1977 implementing in respect of own resources accruing from value-added tax the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal 1977, L 336, p. 8).

3 Under Article 2(1) of that regulation, the VAT own resources basis is to be determined from the taxable transactions referred to in Article 2 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (hereinafter referred to as 'the Sixth Directive', Official Journal 1977, L 145, p. 1). The third indent of Article 2(2) provides that, for the purposes of applying paragraph 1 of that article, transactions which Member States continue to exempt pursuant to Article 28(3)(b) of the Sixth Directive are to be taken into account for determining VAT own resources.

4 In accordance with Article 28(3)(b) and Annex F to the Sixth Directive, the Federal Republic of Germany continues to exempt from VAT telecommunications services supplied by the Deutsche Bundespost (German postal service, hereinafter referred to as 'the Bundespost') and supplies of goods incidental thereto.

5 The second indent of Article 9(2) of Regulation No 2892/77 is worded as follows:

'2. For the purposes of applying the . . . third . . . indent . . . of Article 2(2):

. . . ;

with regard to the transactions listed in Annex F to Directive 77/388/EEC which Member States continue to exempt pursuant to Article 28(3)(b) of the said directive, Member States shall calculate the VAT own resources basis as if these transactions were taxed;

. . . '

6 The Commission found that between 1980 and 1985 the Federal Republic of Germany had deducted from the turnover of the Bundespost an amount corresponding to the VAT implicitly contained in the end price invoiced by the Bundespost to its clients. It took the view that such a method of calculation, which

reduced the basis of assessment for VAT own resources by deducting the amount of input VAT paid by the Bundespost in the area of telecommunications, amounted to a breach of the third indent of Article 2(2) of Regulation No 2892/77. The Commission therefore initiated the procedure provided for under Article 169 of the Treaty.

7 Reference is made to the Report for the Hearing for a fuller account of the background to the case, the course of the procedure 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.

8 In support of its application the Commission contends that, in the case of taxation at each production stage, the basis of assessment must be determined in accordance with the net VAT receipts collected by the Member State during the course of a financial year. In the case of exempt transactions, such as those of the Bundespost in the sphere of telecommunications, the Commission believes that the correct method of calculation, as applied by all the other Member States, is to reconstruct the basis of assessment for calculating own resources by using the turnover relating to such transactions, without deducting, as the Federal Republic of Germany is doing, an amount corresponding to the VAT paid on inputs and contained in the final invoice price in the sphere in question. The Commission puts forward two main arguments to support its view that the method used by the Federal Republic of Germany to determine the basis of assessment for calculating VAT own resources is in breach of Regulation No 2892/77.

9 In the first place, the Commission relies on the wording of the second indent of Article 9(2) of the above regulation.

10 The German Government claims in this connection that the text of that article confirms that it is necessary, in order to determine the basis of assessment for calculating VAT own resources, to act as if VAT were collected on the value added by the Bundespost and to deduct the VAT included in the price paid by the Bundespost for goods purchased or services supplied because those goods or services ought to be regarded as having been used by the Bundespost in taxable transactions within the meaning of Article 17(2) of the Sixth Directive.

11 It must be held in this regard that the phrase 'as if these transactions were taxed' used in Article 9 does not provide an answer to the question whether the transactions at issue must be treated in all respects as if they were transactions taxed at each production stage or simply as exempt transactions which must be incorporated in the basis of assessment for the calculation of VAT own resources.

12 Secondly, the Commission takes the view that the purpose of Articles 2 and 9 of Regulation No 2892/77 is to neutralize the effects on Community revenue of derogating legislation which Member States are entitled to apply. If the method of calculation adopted by the Federal Republic of Germany is used, the rate of VAT has a direct effect on the basis of assessment for the calculation of VAT own resources. This is contrary to the structure of the special system of own resources, in respect of which those Member States which have opted for derogations should be placed on an equal footing with those which have refrained from introducing any system of derogations. The basis of assessment arrived at through the method of calculation advocated by the Commission and applied by the other Member States always remains the same regardless of the VAT rate applied.

13 The Government of the Federal Republic of Germany does not believe that its method of calculation results in a basis of assessment for calculating VAT own resources which varies according to the rate of VAT applied. In view of the fact that the amount deducted from the turnover of the Bundespost corresponds exactly to the VAT included in the purchase price, the basis of assessment is still calculated according to the sum of the net purchase value and the value added by the Bundespost. Member States which exempt certain transactions from VAT are thus required to pay, in proportion to the cost of those transactions, the same amount in VAT own resources as they would be paying were it not for the VAT exemption. In contrast, says the German Government, the basis of assessment under the method of calculation adopted by the Commission, for any given net purchase price and value added, varies in relation to the amount of VAT included in the purchase price.

14 It must be observed that the purpose of the second indent of Article 9(2) of Regulation No 2892/77 is to cancel out the effects of the transitional exemption for the transactions listed in Annex F to the Sixth Directive, in order to make it possible to establish a uniform basis of assessment for calculating VAT own resources, incorporating within the basis of assessment the portion of own resources which corre-

sponds to the exempt transactions. In this way, those Member States which choose to exempt a particular sector are placed on an equal footing, in respect of VAT own resources, with the other Member States which do charge VAT in those sectors.

15 Where the value added is taxed at each stage of production, the VAT rate has no effect on the basis of assessment for calculating VAT own resources. In so far as the amount deducted by the Federal Republic of Germany from the turnover of the Bundespost in the sphere of telecommunications corresponds exactly to the amount of VAT which the Bundespost has paid to its suppliers, the rate of VAT applied does not affect the basis of assessment calculated from the sum of the net purchase value and the value added by the Bundespost.

16 It follows that the second argument submitted by the Commission in support of its application is also unfounded.

17 In the light of these considerations it must be concluded that having regard to the imprecision of the second indent of Article 9(2) of Regulation No 2892/77, which allows various methods of calculation, none of the criticisms made by the Commission has shown that the method adopted by the Federal Republic of Germany to calculate the amount of own resources corresponding to the exempt transactions of the Bundespost which must be included in the basis of assessment of own resources is contrary to the abovementioned provisions of Regulation No 2892/77.

18 The application made by the Commission must therefore be rejected.

Costs

19 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.

Due Schockweiler Mancini

O'Higgins Moitinho de Almeida Grévisse Díez de Velasco

Delivered in open court in Luxembourg on 23 May 1990.

J.-G. Giraud
Registrar

O. Due
President