OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 14 February 1990 *

Mr President
Members of the Court

A — Facts

1. The proceedings to be discussed today are concerned with three questions concerning the Community's own resources. The first question is whether, in so far as they are effected in international waters, transport operations between mainland France and the *départements* of Corsica is subject to value-added tax pursuant to Directive 77/388/EEC. [1]

2. The second question is whether France, since it did not take such action (or rather because it maintained the pre-existing rules on exemption from tax for transport operations between mainland France and Corsica), has to pay compensatory amounts as part of making available the own resources of the Communities for the years 1980 to 1985 (more particularly because the exemption operated could at most be based on Article 28 of Directive 77/388 in conjunction with point 17 of Annex F thereto).

3. The third question is whether interest is chargeable on such payments, which have so far not been made, from 31 October 1986 (when they ought to have been made available to the Commission in accordance with its request).

4. As the Court is aware, the Commission takes the view that such transport operations, where the places of departure and arrival are in French territory and there is no place of call in the territory of other Member States, are to be regarded as supplies of services *within the territory* (within the meaning of Article 2 of Directive 77/388) and thus fully liable to tax with a corresponding effect upon the making available of the Communities' own resources pursuant to Article 2 of Regulation (EEC) No 2892/77. [2] Since the French Republic takes a different view (which, moreover, as we have seen, is shared by the Kingdom of Spain), proceedings were commenced under Article 169 of the EEC Treaty in which the Commission claims a declaration that by failing to comply with the obligation to calculate unpaid own resources for the years 1980 to 1985 and for previous years, by failing to comply with the obligation to send a copy of the calculation to the Commission, by failing to comply with the obligation to make available to the Commission a sum equivalent to the own resources in question by exempting from value-added tax, in breach of the Sixth Directive on value-added tax, the international part of transport operations between mainland France and the *dépar-*

* Original language: German.

1 — OJ 1977, L 145, p. 1.

2 — OJ 1977, L 336, p. 8.

tements of Corsica and by failing to comply with the obligation to pay interest for late payment on those sums until the date they are made available to the Commission under Article 11 of Regulation No 2891/77 [3] and with effect from the dates referred to by the Commission, France has failed to fulfil its obligations under the EEC Treaty.

B — In my view, that claim should be judged as follows:

5. (1) It must be admitted immediately that, according to the wording of Directive 77/388, it is not obvious that the Commission's view is correct. On the contrary, it tends to support the view of France and Spain, for Article 2 states (*inter alia*) that the supply of services effected for consideration within the territory of the country by a taxable person acting as such shall be subject to value-added tax whilst Article 3 defines the 'territory of the country' as the area of application of the Treaty establishing the European Economic Community as stipulated in respect of each Member State in Article 227 (which certainly does not include international waters).

6. (2) It must further be recognized that the two judgments mainly referred to in the proceedings (namely the judgments in Cases 168/84 [4] and 283/84 [5]) do not directly either support the Commission's view or make the defendant's position stronger, for they clearly do not deal with the problem which now concerns us and which did not have to be dealt with at the time.

7. Indeed, in the judgment in Case 168/84 (concerning the supply of services on board sea-going vessels) the Court merely stated that Article 9 of Directive 77/388 does not limit the power of the Member States to tax services supplied outside their territorial jurisdiction (which simply means that Member States are afforded such a possibility without having any obligation in that regard).

8. Similarly, the judgment in Case 283/84 (which concerned sea transport between the Italian peninsula and Sardinia, which is subject to value-added tax for the whole distance) the Court simply stated — in response to the question raised in the proceedings whether a Member State can impose such taxation or whether it is excluded under the Value-Added Tax Directive — that the directive, in particular Article 9(2)(b) thereof, in no way restricts the freedom of the Member States to extend the scope of their tax legislation beyond their normal territorial limits (which again means that they have such a possibility but no obligation to that effect).

9. I would add in parenthesis that the fact that elsewhere in the German version of the judgment it is stated: 'Im Falle derartiger Beförderungen, die als reine Inlandsbeförderungen anzusehen *sind*...' (in the case of such transport operations, which *are*

3 — OJ 1977, L 336, p. 1.

4 — Judgment of 4 July 1985 in Case 168/84 *Gunter Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251.

5 — Judgment of 23 January 1986 in Case 283/84 *Trans Tirreno Express* v *Ufficio Provinciale* [1986] ECR 231

to be regarded as purely internal . . .) is, on the other hand, obviously of no significance, for that wider definition is no doubt due to a translation error as a comparison with the Italian text (Italian was the language of the case) and the French text of the judgment shows 'nel caso dei trasporti suddetti, che *possono* essere considerati come trasporti puramente interni . . . '; 'dans l'hypothèse de tels transporte qui *peuvent* être considérés comme des transports purement internes . . . ').

10. (3) However, it will be observed — and this is the reason why those judgments should not be completely disregarded in the present case — that in Case 168/84 it was stated that Article 9 was designed to secure a rational delimitation of the respective spheres of application of national value-added tax legislation (which justifies the conclusion that too much importance should not be placed on the wording adopted in it so far as it is concerned simply with the definition in the scope of the directive) and there it was also a case of services which took place outside the territorial jurisdiction of the Member States 'on board sea-going ships over which they have jurisdiction' (which would suggest a modification of the territorial principle on which France and Spain put so much weight).

11. In the judgment in Case 283/84, too, reference is made (as in the judgment in Case 51/88 [6]) to the object of Article 9 of the directive of delimiting the spheres of application of national value-added tax legislation in order to avoid conflicts of jurisdiction where a supply of services may be covered by the laws of more than one Member State.

12. The Court also emphasized that no conflict of jurisdiction arises where the ship effecting the transport plies between two points within a single Member State and where the route chosen, even if part of it is outside the national territory, does not pass through any area falling under the national sovereignty of another State. In the case of such transport operations, which may be regarded as purely internal, the territorial scope of value-added tax must therefore be determined on the basis of the basic rules laid down in Articles 2 and 3 of the directive and not on the basis of Article 9. That shows that for the answer to the present case, in which Article 9(2)(b) (to the wording of which Spain's representative attached special importance) does not at all apply, it is more appropriate to refer to the general rules of the Treaty on the territorial scope of Community law.

13. Moreover, on the basis of those judgments, since they stress that the Member States are at liberty to tax operations in international waters, it can easily be shown that the French Government's argument derived from international law on the limits of national sovereignty certainly does not carry much weight.

14. (4) While the judgments cited already show that it is not appropriate, in determining the scope of the Treaty rules, to attach too much importance to the territorial principle upon which France and Spain relied so much, that conclusion, which is important for the present case, may be supported by reference to other

6 — Judgment of 15 March 1989 in Case 51/88 *Hammann* v *Finanzamt Hamburg-Eimsbüttel* [1989] ECR 767.

judgments which make it clear that the principles of the Treaty apply in certain cases also to activities outside the area of the Treaty and thus that the scope of Community law should not be viewed too narrowly.

15. Let me cite first the judgment in Case 167/73,[7] according to which a provision of the French code du travail maritime requiring the crew of a ship to consist of a certain proportion of French members was held to be incompatible with Article 48 of the Treaty and Regulation (EEC) No 1612/68[8] enacted thereunder. Since it was stressed that sea transport was subject to the general rules of the Treaty and therefore any discrimination in relation to access to work and conditions of employment was prohibited, it would be difficult to accept that that rule applies only while the ships concerned are within the territorial waters of the Member States.

16. The principle that the temporary exercise of activities (here transport through international waters) does not suffice to exclude the application of Community law (here the Value-Added Tax Directive) if the activity has a sufficiently close link with the territory of the Community (here the ports of departure and arrival lie within the same Member State) is confirmed by the judgment in Case 237/83.[9] In that judgment Community social law was declared applicable to an activity which an employee from a Member State exercised in a non-member country on behalf of an undertaking from a different Member State.

17. Secondly, I refer to the judgment in Case 9/88[10] (which concerned the question whether a Portuguese worker employed on a Netherlands ship was covered by the Community principle of equal treatment in the exercise of his activity). I consider it very significant that in that case the Court, having regard to the case-law according to which employment outside the territory of the Community may be regarded as employment within the territory of a Member State if there is a sufficiently close connection with that territory, held that a Portuguese worker employed on a Netherlands ship was to be regarded as employed within the territory of that Member State if there were sufficient links with it (determined by the registration of the ship, the shipowner's place of establishment in the Netherlands, the worker's recruitment in the Netherlands, the application of Netherlands law to the contract of employment and the application of Netherlands social security law as well as Netherlands income tax law to the worker).

18. (5) Thus, while the considerations suggested by the judgments cited above (as regards the modification of the territorial principle and the correct interpretation of the spacial scope of the rules of the Treaty) militate against the view put forward by

7 — Judgment of 4 April 1974 in Case 167/73 *Commission v French Republic* [1974] ECR 359

8 — OJ, English Special Edition 1968 (II), p. 475.

9 — Judgment of 12 July 1984 in Case 237/83 *SARL Prodest v Caisse primaire d'assurance maladie de Paris* [1984] ECR 3153

10 — Judgment of 27 September 1989 in Case 9/88 *Mario Lopes da Veiga v Staatssecretaris van Justitie* [1989] ECR 2989

France and Spain regarding the interpretation of the Value-Added Tax Directive, some other arguments reinforce the view that the Commission is right.

19. (a) I am not thinking so much of the (certainly interesting) fact mentioned by the Commission that at the 16th session of the Advisory Committee on Value-Added Tax a very large majority of the delegations was in favour of taxing transport services such as those involved in this case. For, as the Commission admitted and France pointed out, this occurred simply for practical reasons; on the other hand, it was not stated that that conclusion was binding in law.

20. (b) However, the reference to the aim of harmonization pursued by Directive 77/388, which includes, as the title of the directive shows, a uniform basis of assessment, seems to me to be important.

21. If that is borne in mind — and in that regard, as the Commission rightly stated, it should not be overlooked that we are concerned with complete harmonization and that all exemptions (as stated in the judgment in Case 235/85 [11]) 'must be expressly provided for and precisely defined' (paragraph 19) — the conclusion is inescapable that it is incompatible with those aims (as already stated in the Opinion in Case 283/84) for the taxation of transport operations between two places in a Member State to differ depending on whether they take place by land or by sea and, in the latter case, again depending on whether the transport operations take place in coastal waters or outside the 12-mile zone (which, moreover, would be difficult to check and would not be consistent with the principle, expressed in the 17th recital of the directive, of simplifying the levying of tax or with the aim of avoiding fraud or tax avoidance). Even if it has to be admitted that such considerations are irrelevant as regards transport operations to Corsica, their relevance in other situations, which may easily be imagined in certain Member States, cannot be disputed and it is reasonable to take them into account in interpreting the directive, which is of general application. It is accordingly apparent that the directive is governed by the principle that a transport operation effected between two places in a Member State without entering foreign territory is to be regarded as a supply of services effected within the territory of the country.

22. (c) In addition, there is the guidance to be obtained from the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties.

23. As is known, the Commission referred in that respect to Section V 'Taxation' in Annex I, which provided that Article 15 of Directive 77/388 was to be supplemented so that the Portuguese Republic might treat sea and air transport between the islands making up the autonomous regions of the Azores and Madeira and between those regions and the mainland in the same way as international transport. Secondly, it referred to the fact that, according to Article 374 of the Act, the supplementary

11 — Judgment of 26 March 1987 in Case 235/85 *Commission* v *Kingdom of the Netherlands* [1987] ECR 1471.

provision just mentioned was not to affect the amount of duties owed as own resources from value-added tax.

24. Accordingly, it must indeed be assumed that in adopting those provisions all the States concerned accepted that such transport operations were, for the purposes of the Value-Added Tax Directive, national transport operations subject to value-added tax. Had it been clear that the directive was to be interpreted in the way advocated by France and Spain (namely to the effect that the Member States are at liberty to tax or exempt such transport operations), the addition to the Act of Accession would not have been necessary or (this relates to the observation made by the Spanish Government at the hearing that the addition to Article 15 of the Value-Added Tax Directive was necessary because journeys in territorial waters were also to be covered) it could have been limited to treating transport in coastal waters as international transport.

25. In my opinion, that analysis cannot be contradicted by the argument that the purpose of such special provisions in the acts of accession is to resolve specific problems connected with the accession of a Member State and that therefore more far-reaching consequences should not be drawn from them. When, as happens in Section V of Annex I to the Act of Accession in relation to Article 15 of the Value-Added Tax Directive, an addition and amendment of an existing system is adopted, the incidental effect of this is to reveal how the system is to be understood on a particular point; in a way it provides an authentic interpretation of existing rules and not only the solution of a specific accession problem.

26. Moreover, as far as Article 374 of the Act of Accession is concerned, it is not at all apparent why a payment obligation regarding value-added tax for transport services to the places mentioned had to be imposed on Portugal only. In view of the large distances in question, between the mainland and the islands belonging to it, and the economic strength of the Member State concerned, an exemption would have been more in line with expectations.

27. In this regard, therefore, it cannot just be a question of a particular problem being resolved; it is more likely that a principle valid in general for Member States is being made clear.

28. (6) I would therefore take the view that, after carefully weighing all the relevant aspects, it must be recognized that the Commission has put forward the better arguments for its view. The Value-Added Tax Directive therefore requires taxation of the entire stretch between mainland France and Corsica and an exemption is conceivable only under Article 28(3)(b) in conjunction with Annex F to the Value-Added Tax Directive (on which France wished to rely only in so far as transport within coastal waters was concerned).

29. Consequently, it is also clear (on this conclusion there was basically no dispute) that the own resources due as value-added tax must be calculated accordingly, pursuant

to Regulation No 2892/77, and made available to the Community.

30. It is also clear that, since this did not happen in spite of the Commission's request, interest is payable under Article 11 of Regulation (EEC) No 2891/77. A late credit entry is, of course, sufficient in order for interest to become due. However, according to the case-law of the Court, the reason for the lateness of the credit entry does not matter (judgment in Case 303/84 [12]) nor, in particular, the fact that the Member State concerned did not share the Commission's view of the law (Case 93/85 [13]) that is to say that, as was stressed in the present case, it acted in good faith upon a different interpretation of Community law.

C — Conclusion

31. (7) The Commission's application must accordingly be upheld and the declaration made as requested. The French Republic must also be ordered to pay the costs as claimed.

12 — Judgment of 20 March 1986 in Case 303/84 *Commission* v *Federal Republic of Germany* [1986] ECR 1171.

13 — Judgment of 18 December 1986 in Case 93/85 *Commission* v *United Kingdom* [1986] ECR 4011.