OPINION OF ADVOCATE GENERAL DARMON

delivered on 24 June 1992 *

Mr President,
Members of the Court,

1. In this preliminary question, the Rechtbank van Eerste Aanleg (Court of First Instance), Brussels, asks the Court to determine the VAT rules applicable to used goods sold by one taxable person to another taxable person.

2. The facts are as follows. 'K' Line Air Service Europe BV ('K' Line), which is a taxable person for VAT purposes, sold a used Mercedes 280 SE motor vehicle to the Eulaerts NV ('Eulaerts'), which is also a taxable person. 'K' Line drew up an invoice on 27 October 1988 and calculated VAT (25%) and luxury tax (8%) on the basis of the selling price, excluding tax, of BFR 260 000. Eulaerts paid this initial invoice. On 21 February 1989, following a tax inspection, 'K' Line submitted a second invoice, calculating VAT and luxury tax using the 'minimum basis of assessment' of BFR 756 554. The purchaser contested the new invoice. After contacting the relevant tax authorities, the seller made up a third invoice using the 'minimum basis of assessment' reduced to BFR 536 250. The purchaser once again refused to pay the additional tax of BFR 91 163.

3. After paying this sum, 'K' Line sought reimbursement, and to that end instituted proceedings principally against the purchaser, Eulaerts, and in the alternative against the Belgian State. The Rechtbank van Eerste Aanleg before which the case was brought, referred a question to the Court the substance of which relates to the compatibility of national provisions establishing the basis of assessment for VAT on used vehicles with Articles 11 and 27 of the Sixth Council Directive 77/388/EEC of 17 May 1997 [1] and with Articles 9, 10 and 11 of the EEC Treaty.

4. As is rightly pointed out by the Commission, it is not for the Court of Justice to rule, in proceedings for preliminary rulings, on the compatibility with Community law of provisions of national law. Its role is to provide the national court with guidance as to the interpretation of Community law so as to enable that court itself to assess the compatibility of the national provisions with Community law.

5. To the end, in order to provide the national court with a worthwhile answer, the question should be expanded to include the scope of Article 32 of the Sixth Directive, which is concerned with second-hand goods.

* Original language: French.

1 — Directive on the harmonization 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).

I — Articles 9 to 12 of the EEC Treaty

6. That having been said, Articles 9 to 11 of the EEC Treaty may be disregarded straightaway. The national court probably intended to refer to Article 12, which prohibits the introduction of new customs duties or charges having equivalent effect. The question is intended principally to enable it to determine whether the Belgian VAT scheme applicable to second-hand cars is compatible with the Community provisions in force. Articles 9 to 12 of the Treaty relate to customs duties and charges having equivalent effect and presuppose a foreign element which seems absent in this case since the sale took place in Belgium between two companies established there. More importantly, moreover, the Court has always regarded VAT as forming part of a general system of internal taxation whose compatibility with the Treaty must be considered in the context of Article 95 of the EEC Treaty and not of Articles 9 to 12. [2]

'Value added tax which a Member State levies on the importation of products from another Member State is part of the common system of value added tax the structure of which, and the essential terms governing its application, have been laid down by the Council in harmonizing directives which have established a uniform taxation procedure covering systematically and according to objective criteria both transactions carried out within the territory of a Member State and import transactions. Such a tax must therefore be considered as an integral part of a general system of internal taxation for the purposes of Article 95 of the Treaty and its compatibility with Community law must be considered in the context of that Article and not of that of Article 12 *et seq* of the Treaty.' [3]

II — Articles 11, 27 and 32 of the Six Directive

7. It is therefore by reference to the relevant provisions of the Sixth Directive that the national court will have to assess the compatibility of the Belgian legislation on value added tax namely Royal Decree No 17 of 20 July 1970, as amended by Royal Decree No 17 of 20 December 1984.

8. Originally, Royal Decree No 17 of 20 July 1970, laying down rules on the taxation of new and second-hand cars, set as the minimum basis of assessment the list price for new cars and a percentage of the list price for second-hand cars.

9. Following the Court's ruling on new cars [4] Belgium, by Decree No 17 of 20 December 1984, subjected only second-hand cars to a minimum basis of assessment based on a percentage of the list price. However, at the time when the legislation was amended the number and percentage of the rates was increased from seven rates ranging from 65 to 10% to ten rates ranging from 85 to 10%.

2 — For example, judgment in Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen ('Schul I')* [1982] ECR 1409, at paragraph 21.

3 — Judgment in Case 249/84 *Ministère Public* v *Profant* [1985] ECR 3237 at paragraph 15.

4 — Judgment in Case 324/82 *Commission* v *Belgium* [1984] ECR 1861.

10. The fundamental aim of the Sixth Directive is to guarantee the neutrality of turnover tax, in particular by harmonizing the basis of assessment.

11. The concept of basis of assessment is of primary importance here; it underlies all the arguments as three successive bases have led to three different calculations of the amount of tax due.

12. Article 11 of the Sixth Directive provides that:

'The taxable amount shall be:

(a) in respect of supplies of goods and services (...) everything which constitutes *the consideration which has been or is to be obtained by the supplier from the purchaser* (...)' [5]

That basis of assessment applies immediately to new goods. In respect of second-hand goods, Article 32 provides:

'The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977 a Community taxation system to be applied to used goods, works of art, antiques and collectors' items.

Until this Community system becomes applicable, Member States applying a special system to these items at the time this directive comes into force may retain that system.'

13. Article 27 provides:

'1. The Council acting unanimously on a proposal from the Commission, may authorize any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

(...)

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.'

14. Thus, the relevant provisions of the Sixth Directive comprise a rule, in Article 11, and two derogations, laid down respectively in Articles 27 and 32.

15. The structure of those provisions is such that the first question to consider is whether the goods in question are second-hand or new. If the goods are held to be second-

5 — My emphasis.

-hand, the analysis need not be taken any further. If, on the other hand, the goods may not properly be regarded as second-hand, they are in principle governed by the rules laid down in Article 11 so that it is necessary to consider whether it is possible to envisage a derogation from that rule under Article 27.

1 — *Article 32*

16. Article 32, which was not referred to by the national court, forms the main basis for discussion. There are two aspects to this. The first, upon which the whole discussion rests relates to the very concept of 'second-hand goods'. The second, which is only relevant if the goods in question are to be considered second-hand within the meaning of the first paragraph of Article 32, concerns the scope of the derogation contained in the second paragraph of that article.

17. On the first point, it should be remembered that in the proposal for a Sixth Directive, presented by the Commission to the Council on 29 June 1973, [6] Article 26 provided for a special scheme for second-hand goods clearly defined as 'used movable property which can be re-used as it is or after repair (...)'. That scheme principally governed the problem of the sale of second-hand goods by a non-taxable person, or by a taxable person who was not entitled to make any deduction of VAT, to a taxable person intending to re-sell the goods. It was envisaged that the purchaser should be able to deduct the VAT calculated on the basis of the rate in force at the time when the goods were acquired. However, no provision was made in respect of the sale of second-hand goods by a taxable person to another taxable person.

18. The Sixth Directive adopted by the Council on 17 May 1977 represents a retreat from the initial proposals put forward by the Commission. The definitive text does not settle the question of the taxation of second-hand goods which, moreover, are no longer defined. It refers to a later Council decision, the Member States being authorized, as has already been seen, to continue to apply any special scheme already in force. This is clearly the case with Belgium since it applied the Royal Decree of 20 July 1970, as amended by the Royal Decree of 20 December 1984, which governed in particular the taxation of second-hand goods.

19. However, the urgent need to adopt a seventh directive on harmonization of the VAT legislation of the Member States relating to works of art, collectors' items, antiques and used goods soon became apparent to the Commission. [7] It presented two proposals for directives to the Council, one on 11 January 1978 [8] and one on 11 January 1989. [9] Their common aim was the elimination of double taxation. The second recital of the first proposal states 'in the absence of special rules, a finished item re-introduced into the economic circuit would once again be fully subject to value added tax and the taxable person wishing to resell the item be

6 — OJ 1973 C 80, p. 1.

7 — First Report from the Commission to the Council on the application of the common system of value added tax, COM(83)426 final, pp. 68-70.

8 — OJ 1978 C 26, p. 2.

9 — OJ 1989 C 76, p. 10.

unable to deduct the tax included in the item's purchase price'. [10] The definition of second-hand goods given in these proposals is substantially identical to that in the draft version of the Sixth Directive, and the case chiefly referred to remains the taxation of goods acquired, by a taxable person for resale from a non-taxable person or a taxable person who cannot exercise the right to a deduction.

20. However, Article 32(4) of the proposal of 11 January 1989 provides that: 'The special arrangement shall not apply to supplies of goods by a taxable dealer where he has acquired them from a taxable person who has invoiced the VAT in accordance with Article 22(3)'. In that case, which corresponds, it would seem, to the situation concerned in these proceedings, the proposal (which has not yet been adopted) expressly states that the special arrangements concerning second-hand goods are not to apply. The question before the Court is precisely whether the sale of a used car by a taxable person to another taxable person comes within the ambit of Article 32 of the Sixth Directive.

21. There have been several cases before the Court on second-hand goods. In relation to the application of VAT systems, there have often been cases concerned mainly with the importation of such goods.

22. Thus, in the judgment *Staatssecretaris van Financiên* v *Schul* [11] the Court stated:

'Where a Member States charges VAT on the importation (...) of goods supplied by a private person (...) the VAT payable on importation must be calculated by taking into account the amount of VAT paid in the Member State of exportation that is still contained in the value of the goods at the time of importation in such a way that that amount is not included in the taxable amount and is in addition deducted from the VAT payable on importation.'

The Court's main concern was to ensure that Article 95 of the Treaty was adhered to and to avoid double taxation of the imported second-hand goods.

23. Likewise, in the case of *Rainer Drexl*, [12] concerning the importation of a second-hand vehicle from a Member State applying a different rate of VAT from the one in force in the exporting country, the Court, basing its reasoning on Article 95 of the EEC Treaty, stated that:

'(...) in the case of the importation from another Member State by a private individual of goods in respect of which there has not been granted either tax relief on exportation or tax exemption in the importing Member State, the value added tax charged on importation must take into account the residual amount of value added tax paid in the Member State of exportation which is still contained in the value of the goods at the time of importation, in such a way that that residual amount is not included in the taxable amount and is deducted from the value added tax payable on importation'. [13]

10 — OJ 1978 C 26, p. 2.

11 — Case 47/84 *Staatssecretaris van Financiên* v *Schul* ('Schul II') [1985] ECR 1491.

12 — Case 299/86 *Drexl* [1988] ECR 1213.

13 — Paragraph 13.

24. Those two cases, although concerning the application of VAT rules to second-hand goods, differed from the present situation inasmuch as they involved the importation of goods and concerned a final consumer who was not a taxable person and who had paid VAT without being able to deduct it. However, they help to identify an initial factor which assists in the *fiscal* definition of second-hand goods. Second-hand goods are goods which, unlike new goods, still contain a residual part of VAT.

25. There is, however, a case which, without being on all fours with the present case, resembles it greatly, namely *ORO Amsterdam Beheer and Concerto* v *Inspecteur der Omzetbelasting*. [14] The preliminary question raised by the Amsterdam Gerechtshof related directly not to Article 95 of the Treaty but to Article 32 of the Sixth Directive. The Court stressed the incomplete nature of the harmonization of the Community VAT system and stated that

'That objective has not yet been achieved, however, as is clear from Article 32 of the Sixth Directive, and nowhere in the common system of value added tax, as it stands at present, are to be found the necessary bases for determining and laying down detailed rules for applying a common system of taxation enabling double taxation to be avoided in trade in second-hand goods.' [15]

26. The case before the Court related to a sale by a non-taxable person to a taxable person. Furthermore, it is important to note that, in cases on taxation of second-hand goods, goods retaining a residual part of VAT frequently feature. Clearly, the Community VAT system applying to second-hand goods was constructed almost exclusively on that relationship of non-taxable person to taxable person. The Court stated in the above case that:

'The harmonization is designed in particular to preclude double taxation, so that the deduction of input tax at each stage of taxation is an integral part of the system of VAT.' [16]

27. As I have pointed out, the Court has never considered the case of a supply of second-hand goods between two taxable persons. Having outlined the general framework of the dispute and explained the manner in which the Court has defined the scope of Article 32 of the Sixth Directive, I must now consider whether the transaction in question falls under that article or whether Article 11 of the Sixth Directive applies. In other words, under the Sixth Directive are goods which are used but are free of all tax second-hand goods within the meaning of Article 32 or are they new goods?

28. In cases on trade in second-hand goods, the Court's principal concern has been that competition between sales by professional dealers (taxable persons) and by private

14 — Case 165/88 *ORO Amsterdam Beheer and Concerto* v *Inspecteur der Omzetbelasting* [1989] ECR 4081.

15 — Paragraph 23.

16 — Paragraph 22.

persons should not be distorted. In this context, in *Commission* v *Netherlands* [17] and in *Commission* v *Ireland*, [18] the Court held:

'Second-hand goods which are re-introduced into commercial circulation are therefore taxed once again, whereas second-hand goods which pass directly from one consumer to another remain burdened solely by the tax imposed on the occasion of the first sale to a non-taxable consumer. Especially where the rate of VAT is high, that difference in treatment distorts competition between direct sales from one consumer to another and transactions passing through ordinary commercial channels, and thus places at a disadvantage branches of trade in which a large number of transactions involve second-hand goods, such as the motor-car trade in particular.' [19]

29. That same concern led the Commission, in its second proposal for a Seventh Directive, to suggest that for second-hand goods the method of calculation be as follows:

'The taxable amount shall be the difference, for each transaction, between the selling price and the purchase price. The selling price shall be the price charged by the taxable dealer without value added tax. The purchase price shall be the tax-inclusive price paid by the taxable dealers.' [20]

Thus, the taxable basis as defined above would enable actual value added at the time of the transaction to be calculated.

30. However, that method of calculation, if it were in force, would be completely inapplicable in the present case as the vehicle was free of all tax at the time when it was supplied. It would be impossible to calculate the difference between a tax-free sale price of BFR 260 000 and a purchase price which cannot be considered to include tax, the tax having been deducted previously.

31. In the light of the foregoing, there is no doubt that the concerns expressed both by the Court and by the Commission in its proposals for directives concerning the basis of assessment for VAT on second-hand goods are different from the case before the national court and that it is necessary to go beyond the general answers given by the Commission on this subject. [21]

32. Furthermore, the physical state of the goods should not affect the Court's reasoning. Certainly, the vehicle is used. However, the Court has had to consider the concept of 'new' goods and of 'used' goods on several occasions. In *Schloh* v *Auto Contrôle Technique*, [22] Advocate General Mancini took the view that 'the definition of "new" and "used" is not the same as the dictionary definition (...)'. Likewise, Advocate General Rozès stated in *Schul* v *Inspecteur der Invoerrechten en Accijnzen* above:

17 — Case 16/84 *Commission* v *Netherlands* [1985] ECR 2355.
18 — Case 17/84 *Commission* v *Ireland* [1985] ECR 2375.
19 — Paragraphs 18 and 14, respectively.
20 — Article 32B(1), first paragraph.
21 — Written question No 2096/84 (OJ 1985 C 193, p. 19), see also written question No 489/88 (OJ 1989 C 63, p. 18).
22 — Case 50/85 *Schloh* v *Auto Contrôle Technique* [1986] ECR 1855.

'Even the definition of second-hand goods is not simple. In a general way it may be said that second-hand goods are goods which may, if necessary after being reconditioned, be re-used in the place of new goods serving the same purpose. (...) All such goods have the characteristic that once they have reached the ultimate consumer at the end of a series of trade transactions they may, after some use, be re-introduced into trade or use. No matter to what category they belong they may have, moreover, the characteristic, in contrast to new goods, of being able to be transferred without the intervention of a trade.' [23]

That definition takes into account perfectly the fiscal situation of the second-hand goods when they reach the final consumer. The concept of consumption is undoubtedly more relevant to the definition of second-hand goods than the used condition of the goods, VAT being a tax intended to be imposed definitively on goods, after a cycle of taxation and deductions, when they reach the stage of final consumption, that is to say, the stage at which they pass to a non-taxable person. [24] The Commission's representative rightly stated, in his oral observations, for the purposes of Article 32 second-hand goods are ones in respect of which the VAT chain of seller and purchaser has been interrupted by the intervention of a final consumer.

33. Consequently, and in the light of the previous observations, reasoning based on the internal coherence of the VAT system and on the aims which the Court and the Commission assigned to the VAT scheme applicable to second-hand goods, namely avoiding double taxation and allowing free competition between sales between two non-taxable persons and those following the traditional commercial pattern, leads me to the following consideration.

34. Where supply of goods is effected for consideration within the territory of a country by a taxable person to another taxable person, both acting as such, [25] that is to say independently and habitually carrying out the activities of producers, traders and persons supplying services, [26] it clearly falls within the scope of the general scheme of the Sixth Directive and the taxable basis is therefore that of Article 11A of the Directive. That the goods have been physically used is a matter of fact and does not preclude the application of the fiscal regime defined therein.

35. Moreover, a study of the general scheme of the system of deductions, 'the cornerstone of the common system', [27] as provided for in the Sixth Directive [28] suggests that the proposals for a Seventh Directive were made with the sole aim of recreating fictionally a right of deduction for traders in second-hand goods, whose activity is based on the purchase of goods from non-taxable persons and who are therefore never able to make a deduction of VAT. The desired aim is to incorporate trade in second-hand goods into the normal VAT chain. [29]

23 — Case 15/81 *Schul* v *Inspecteur der Invoerrechten en accijnzen* [1981] ECR 1409, pp. 1442-1443.

24 — Claeys Bouuaert Ignace, Les notions de base de la TVA dans quelques arrêts récents de la Cour de justice européenne, Journal de droit fiscal, 1989, p. 275.

25 — Article 2 of the Sixth Directive.

26 — Article 4 of the Sixth Directive.

27 — Opinion of Advocate General Simone Rozès in *Schul* v *Inspecteur der Invoerrechten*, above.

28 — Articles 17 et seq. of the Sixth Directive.

29 — See Dominique Berlin, 'Harmonisation des fiscalités', *Jurisclasseur Europe*, fascicule 1630, p. 20.

36. As to the second point referred to earlier, on Article 32(2), if the goods which are the subject-matter of the litigation had been considered second-hand, the question would have arisen as to whether the amendment of 20 December 1984 to Royal Decree No 17 of 20 July 1970 should be regarded merely as a technical amendment without any bearing on the right to retain the previous rules or whether the increase in the number and levels of rates should be interpreted as creating a new scheme, post-dating the entry into force of the Sixth Directive.

37. However, as the supply of used goods by a taxable person to another taxable person does not, to my mind, come within the ambit of Article 32 of the Sixth Directive, any discussion of this is unnecessary.

38. It remains for me to examine whether such a transaction may come under the derogation to Article 11 provided for by Article 27.

2 — *Article 27 of the Sixth Directive*

39. The Commission considers that the Kingdom of Belgium cannot rely on Article 27. In this context, it cites the judgment of the Court in *Commission* v *Belgium*. [30]

40. The Commission instigated proceedings against the Kingdom of Belgium under Article 169 of the EEC Treaty in order to obtain a declaration that the special rules governing the basis for charging VAT on new cars and on so-called 'voitures de direction', as set out in particular in Royal Decree No 1 of 20 July 1970, was in breach of Article 11 of the Sixth Directive.

41. After stating that it was 'common ground that the Belgian rules' [31] were at variance with this provision, the Court considered whether those rules could 'derogate from Article 11 (...) of the Directive as "special measures" within the meaning of paragraphs (1) and (5) of Article 27'. [32] The Court held that

'However, by applying to all new cars the catalogue prices notified to the Belgian authorities, the Belgian legislation entails such a complete and general amendment of the basis of assessment that it is impossible to accept that it contains only the derogations needed to avoid the risk of tax evasion or avoidance. In particular, it has not been proved that, in order to attain the aim in view, it is necessary that the taxable amount should be fixed on the basis of the Belgian catalogue price or that the taking into account of any form of price discount or rebate should be excluded in such a comprehensive manner.' [33]

'It follows that the measures at issue are disproportionate to the aim in view in so far as they depart in a general and systematic way from the rules laid down in Article 11 by

30 — Case 324/82 *Commission* v *Belgium* [1984] ECR 1861.

31 — Ibid. point 19.

32 — Ibid. point 20.

33 — Ibid. point 31.

covering sales and imports of all new cars, either leaving the factory or already used for a period of less than six months'. [34]

In conclusion the Court held that

'it must be decided that, by retaining the catalogue price as the minimum basis to charging VAT on new cars, either supplied within the country or imported, as a special measure derogating from Article 11 of the Sixth Directive, when the requirements laid down in Article 27(5) of the directive are not fulfilled, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty'. [35]

42. It appears to me as it does to Eulaerts, that the interpretation of Article 27, given here in the context of the Court's ruling on new cars, [36] applies *a fortiori* to used cars. The intrinsic value of used cars varies according not only to reductions and rebates but also, and no doubt even more so, according to their condition (number of kilometres on the clock, quality or lack of maintenance, etc).

43. Thus, Article 27 of the Sixth Directive should be interpreted as meaning that, in general, the derogation which it allows cannot be relied upon to support the compatibility of national legislation with Community law where the provisions are disproportionate in the light of the *ratio legis* of the derogation, that is 'to simplify the collection of the tax or (...) to avoid fraud or tax evasion', it being noted that 'the measures intended to simplify the collection of the tax cannot influence, *other than to a negligible extent*, the amount of tax due at the final consumption stage'. [37]

3 — *Article 11 of the Sixth Directive*

44. It follows that Article 11 of the Sixth Directive must be interpreted as governing the supply of goods, used or otherwise, from a taxable person to another taxable person.

45. In conclusion, my opinion is that the Court should rule as follows:

(1) Value added tax should be considered an integral part of a general system of internal taxation within the meaning of Article 95 of the EEC Treaty. It

34 — Ibid. point 32.
35 — Ibid. point 34.
36 — And on 'voitures de direction'.
37 — My emphasis.

follows that the compatibility with Community law of national VAT rules must be assessed in the light of that article and not of Articles 9 et seq. of the Treaty.

(2) Article 32 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 — must be interpreted as meaning that it does not apply to supply of goods, even used goods, by a taxable person to another taxable person.

(3) Article 27 of that same directive must be interpreted as meaning that the derogation which it contains does not render compatible with Community law national rules whose provisions are disproportionate in relation to the *ratio legis* of the derogation.

(4) Article 11 of the Sixth Directive is at variance with rules which, in the case of the supply of a used vehicle by a taxable person to another taxable person, apply a rate of VAT calculated using a flat-rate basis of assessment based on a percentage of the list price.