

COUNCIL DIRECTIVE 2006/69/EC

of 24 July 2006

amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽²⁾,

Whereas:

- (1) In order to combat tax evasion or avoidance and to simplify the procedure for charging value added tax, certain derogations covering similar problems were granted under varying terms to individual Member States by the Council pursuant to Article 27(1) of 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 ⁽³⁾. A solution to the said problems should be made available to all Member States through incorporation into that Directive. Those measures should be proportionate and limited to countering the problem concerned. Given that the Member States have different needs, that incorporation should be limited to extending the option of adopting the rules concerned to all Member States, as and when the need arises.
- (2) Member States should be able to take action to ensure that measures provided for in Directive 77/388/EEC relating to the taxable person and the transfer of a business as a going concern are not being exploited to evade and avoid tax.
- (3) It should be possible for Member States to intervene as regards the value of supplies and acquisitions in specific limited circumstances, to ensure that there is no loss of tax through the use of connected parties to derive tax benefits.
- (4) It should be possible for Member States to include, within the taxable amount of a transaction which involves the working of investment gold provided by a customer, the value of that investment gold where, by virtue of being worked, the gold loses its status of investment gold.
- (5) It should be emphasised that certain services with the nature of capital items may be included in the scheme which allows the adjustment of deductions for capital items over the lifetime of the asset, according to its actual use.
- (6) Member States should be able, in specific cases, to designate the recipient of supplies as the person responsible for paying and accounting for value added tax. This should assist Member States in simplifying the rules and countering tax evasion and avoidance in identified sectors and on certain types of transactions.
- (7) Directive 77/388/EEC should therefore be amended accordingly.
- (8) Consequently, Member States should not be able to continue to avail themselves of individual derogations granted to them by certain Council Decisions adopted pursuant to Article 27(1) of Directive 77/388/EEC and which are covered by the provisions in this Directive. The Decisions concerned should therefore be explicitly repealed. This Directive should not affect measures applied by Member States pursuant to Article 27(5) of Directive 77/388/EEC; nor should it affect derogations which have been granted pursuant to Article 27(1) of that Directive and which have not been repealed by this Directive.
- (9) The application of certain provisions in this Directive should be optional and they should allow Member States a certain degree of discretion. Where appropriate for reasons of transparency, it should be provided that Member States should inform the other Member States through the Advisory Committee on value added tax established under Article 29 of Directive 77/388/EEC of any national law adopted pursuant to those provisions. Such information should not be necessary with respect to national measures taken under a Decision which is repealed by this Directive, or which expires at the date of this Directive's entry into force, but which a Member State continues to apply under the provisions of this Directive.

⁽¹⁾ Opinion of 6 July 2006 (not yet published in the Official Journal).

⁽²⁾ OJ C 65, 17.3.2006, p. 103.

⁽³⁾ OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2006/18/EC (OJ L 51, 22.2.2006, p. 12).

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/388/EEC is amended as follows:

1. In Article 4(4), the following subparagraph shall be added:

‘A Member State exercising the option provided for in the second subparagraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.’.

2. In Article 5(8) the second sentence shall be replaced by the following:

‘Where appropriate, Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.’.

3. Article 11(A) shall be amended as follows:

(a) in paragraph (1)(d) the second subparagraph shall be deleted;

(b) the following paragraphs shall be added:

‘5. Member States shall have the option of including in the taxable amount in respect of the supply of goods and services, the value of exempt investment gold within the meaning of Article 26b, which has been provided by the customer to be used as a basis for working and which as a result, loses its VAT exempt investment gold status when such goods and services are supplied. The value to be used is the open market value of the investment gold at the time that those goods and services are supplied.

6. In order to prevent tax evasion or avoidance, Member States may take measures to ensure that the taxable amount in respect of a supply of goods or services shall be the open market value. The option shall be applied only in respect of supplies of goods and services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State. For these purposes legal ties may include the relationship between an employer and employee or the employee’s family, or any other closely connected persons.

The option in the first subparagraph may apply only in any of the following circumstances:

(a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Article 17;

(b) where the consideration is lower than the open market value and the supplier does not have a full right of deduction under Article 17 and the supply is subject to an exemption under Article 13 or Article 28(3)(b);

(c) where the consideration is higher than the open market value and the supplier does not have a full right of deduction under Article 17.

Member States may restrict the categories of suppliers or recipients to whom the measures in the first and the second subparagraph shall apply.

Member States shall inform the Committee established in accordance with Article 29 of any new national measure adopted pursuant to the provisions of this paragraph.

7. For the purposes of this Directive, “open market value” shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm’s length within the territory of the Member State in which the supply is subject to tax.

Where no comparable supply of goods or services can be ascertained, “open market value” shall mean, in respect of goods, an amount that is not less than the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply; in respect of services it shall mean not less than the full cost to the taxable person of providing the service.’.

4. Article 17(4), in the version set out in Article 28f(1), shall be amended as follows:

(a) in point (a) of the second subparagraph ‘Article 21(1)(a) and (c)’ shall be replaced by ‘Article 21(1)(a), (1)(c) or (1)(f) or Article 21(2)(c)’;

(b) in point (b) of the second subparagraph ‘Article 21(1)(a)’ shall be replaced by ‘Article 21(1)(a), or (1)(f) or Article 21(2)(c)’.

5. In Article 18(1)(d), in the version set out in Article 28f(2), 'Article 21(1)' shall be replaced by 'Article 21(1) or Article 21(2)(c)'.

6. In Article 20(4), the following subparagraph shall be added:

'Member States may also apply paragraphs 2 and 3 to services which have characteristics similar to those normally attributed to capital goods.'

7. In Article 21(2), in the version set out in Article 28g, the following point shall be added:

'(c) where the following supplies are carried out, Member States may lay down that the person liable to pay tax is the taxable person to whom those supplies are made:

- (i) the supply of construction work, including repair, cleaning, maintenance, alteration and demolition services in relation to immovable property, as well as the handing over of construction works considered to be a supply of goods by virtue of Article 5(5);
- (ii) the supply of staff engaged in activities covered by (i);
- (iii) the supply of immovable property, as referred to in Article 13(B)(g) and (h), where the supplier has opted for taxation of the supply pursuant to point (C)(b) of that Article;
- (iv) the supply of used material, used material which cannot be re-used in the same state, scrap, industrial and non industrial waste, recyclable waste, part processed waste and certain goods and services, as identified in Annex M;
- (v) the supply of goods provided as security by one taxable person to another in execution of that security;
- (vi) the supply of goods following the cession of the reservation of ownership to an assignee and the exercising of this right by the assignee;
- (vii) the supply of immovable property sold by the judgment debtor in a compulsory sale procedure.

For the purposes of this point, Member States may provide that a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2 shall be deemed to be a taxable person in respect of supplies received as referred to in the first subparagraph. A non-taxable body governed by public law, may be deemed to be a taxable person in respect of supplies received as referred to in (v), (vi) and (vii).

For the purposes of this point, Member States may specify the supplies of goods and services covered, and the categories of suppliers or recipients to whom these measures may apply. They may also limit the application of this measure to some of the supplies of goods and services listed in Annex M.

Member States shall inform the Committee established in accordance with Article 29 of any new national measure adopted pursuant to the provisions of this point.'

8. Annex M set out in Annex I to this Directive shall be added.

Article 2

Decisions listed in Annex II of this Directive shall be repealed with effect from 1 January 2008.

Article 3

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive.

They shall apply the provisions necessary to comply with Article 1(3), as concerns a new Article 11A(7) of Directive 77/388/EEC, and with Article 1(4), as concerns the reference in Article 17(4) points (a) and (b) of Directive 77/388/EEC in the version set out in Article 28f(1) to Article 21(1)(f) of that Directive, from 1 January 2008 at the latest.

When Member States adopt provisions under this Directive, they shall forthwith communicate to the Commission the text of those provisions, which shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 4

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 24 July 2006.

For the Council
The President
K. RAJAMÄKI

ANNEX I

'ANNEX M

List of supplies of goods and services as referred to in Article 21(2)(c)(iv)

- (a) the supply of ferrous and non ferrous waste, scrap, and used materials including that of semi-finished products resulting from the processing, manufacturing or melting down of ferrous and non-ferrous metals and their alloys;
 - (b) the supply of ferrous and non-ferrous semi-processed products and certain associated processing services;
 - (c) the supply of residues and other recyclable materials consisting of ferrous and non-ferrous metals, their alloys, slag, ash, scale and industrial residues containing metals or their alloys and the supply of selection, cutting, fragmenting and pressing services for these products;
 - (d) the supply of, and certain processing services relating to, ferrous and non-ferrous waste as well as parings, scrap, waste and used and recyclable material consisting of cullet, glass, paper, paperboard and board, rags, bone, leather, imitation leather, parchment, raw hides and skins, tendons and sinews, twine, cordage, rope, cables, rubber and plastic;
 - (e) the supply of the materials referred to in this annex after processing in the form of cleaning, polishing, selection, cutting, fragmenting, pressing or casting into ingots;
 - (f) the supply of scrap and waste from the working of base materials.'
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ANNEX II

List of Decisions under Article 27 of Directive 77/388/EEC repealed by this Directive

The Council Decision deemed to have been adopted on 15 April 1984 authorising the United Kingdom to apply a measure derogating from the Sixth Directive with a view to avoiding certain types of fraud or tax evasion on supplies of gold, gold coins and gold scrap between taxable persons by a special tax accounting scheme ⁽¹⁾.

The Council Decision deemed to have been adopted on 11 April 1987 authorising the United Kingdom to apply a measure derogating from Article 11 of Directive 77/388/EEC ⁽²⁾.

Council Decision 88/498/EEC ⁽³⁾ authorising the Kingdom of the Netherlands to apply a measure derogating from Article 21(1)(a) of Directive 77/388/EEC.

A Council Decision deemed to have been adopted on 18 February 1997 under the procedure contained in Article 27(4) of Directive 77/388/EEC in its version of 17 May 1977 authorising the Republic of France to apply a measure derogating from Articles 2 and 10 of Directive 77/388/EEC. This decision follows notification of the request to Member States on 18 December 1996.

Council Decision 98/23/EC ⁽⁴⁾ authorising the United Kingdom to extend application of a measure derogating from Article 28e(1) of Directive 77/388/EEC.

Council Decision 2002/439/EC ⁽⁵⁾ authorising Germany to apply a measure derogating from Article 21 of Directive 77/388/EEC.

Council Decision 2002/880/EC ⁽⁶⁾ authorising Austria to apply a measure derogating from Article 21 of Directive 77/388/EEC.

Council Decision 2004/290/EC ⁽⁷⁾ authorising Germany to apply a measure derogating from Article 21 of Directive 77/388/EEC.

Council Decision 2004/736/EC ⁽⁸⁾ authorising the United Kingdom to introduce a special measure derogating from Article 11 of Directive 77/388/EEC.

Council Decision 2004/758/EC ⁽⁹⁾ authorising Austria to apply a measure derogating from Article 21 of Directive 77/388/EEC.

⁽¹⁾ OJ L 264, 5.10.1984, p. 27.

⁽²⁾ OJ L 132, 21.5.1987, p. 22.

⁽³⁾ OJ L 269, 29.9.1988, p. 54.

⁽⁴⁾ OJ L 8, 14.1.1998, p. 24. Decision as last amended by Decision 2003/909/EC (OJ L 342, 30.12.2003, p. 49).

⁽⁵⁾ OJ L 151, 11.6.2002, p. 12.

⁽⁶⁾ OJ L 306, 8.11.2002, p. 24.

⁽⁷⁾ OJ L 94, 31.3.2004, p. 59.

⁽⁸⁾ OJ L 325, 28.10.2004, p. 58.

⁽⁹⁾ OJ L 336, 12.11.2004, p. 38.