JUDGMENT OF THE COURT
10 July 1985 *

In Case 16/84

Commission of the European Communities, represented by its Legal Adviser, D.R. Gilmour, acting as Agent, assisted by H.J. Bronkhorst, Advocate at the Hoge Raad der Nederlanden, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at its Embassy, 5 rue Spoo,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period the laws, regulations or administrative provisions needed to comply with Article 11 of the Sixth Council Directive (No 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 (Official Journal 1977, L 145, p. 1), the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of Lord Mackenzie Stuart, President, G. Bosco and O. Due (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet and T.F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

after hearing the Opinion of the Advocate General delivered at the sitting on 28 March 1985,

gives the following

* Language of the Case: Dutch.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

By an application lodged at the Court Registry on 18 January 1984 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to adopt within the prescribed period the laws, regulations or administrative provisions needed to comply with Article 11 of the Sixth Council Directive (No 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'), the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty.

In particular, the Commission complains that the Kingdom of the Netherlands has retained Article 8 (3) of the Wet op de Omzetbelasting 1968 [Netherlands Law on Turnover Tax of 1968], which concerns the taxable amount in the case of the supply of movable goods where goods of the same kind are traded in and provides that, subject to certain conditions, the value of the trade-in is not included in the consideration payable by the purchaser.

The Commission considers that that provision is contrary to Article 11 A (1) (a) of the Sixth Directive, which provides that the taxable amount is to be everything which constitutes the consideration which has been or is to be obtained from the purchaser or a third party for the goods or services supplied.

It should be remembered that the reintroduction of second-hand goods into commercial circulation has already been the subject of several Community proposals. Thus the Proposal for a Sixth Directive (Official Journal 1973, C 80, p. 1) contained a provision which was intended to reduce the tax on second-hand goods in order to avoid penalizing certain branches of trade. As that provision was not adopted by the Council, Article 32 of the Sixth Directive provided that before 31 December 1977 the Council, acting unanimously on a proposal from the

Commission, was to adopt a Community taxation system to be applied *inter alia* to used goods and that until that Community system became applicable, Member States applying a special system to such items at the time when the Sixth Directive came into force could retain that system. On 11 January 1978 the Commission submitted to the Council a Proposal for a Seventh Directive (Official Journal 1978, C 26, p. 2) providing for a common system of value-added tax to be applied to used goods, but that proposal has not yet been acted upon.

5 Having received the letter dated 23 February 1981 in which the Commission requested the Kingdom of the Netherlands to submit its observations, the Netherlands Government stated in a letter dated 4 June 1981 that the contested provision constituted a special system applicable to second-hand goods which could be retained by virtue of Article 32 of the Sixth Directive. However, the Government stated that it was prepared to consider changes in order to bring the Netherlands system into line with the common systems set out in the Proposal for a Seventh Directive.

6 In its reasoned opinion dated 11 January 1983 the Commission denied that Article 32 of the Sixth Directive authorized the application of a special system to the sale of new goods paid for partly by means of a trade-in of second-hand goods. As to the possibility of amending the Netherlands system, referred to in the letter from the Netherlands Government, the Commission stated that it 'could not permit the cessation of an existing infringement of the Treaty to be made subject to additional conditions concerning a problem which, albeit connected, is none the less different'.

7 On 24 February 1983 the Netherlands Minister for Finance sent a letter to a Commission official who was at that time a member of the private office of the Netherlands Commissioner. In that letter the Minister attempted *inter alia* to show, by means of worked examples, that in practice the Netherlands system gave rise to the same results as the systems provided for in the Proposal for a Seventh Directive; in addition, the Minister repeated that the Netherlands Government was prepared to bring its system even further into line with those systems; lastly, he informed the addressee of the letter that, as a result of an interview with an official of the Commission department concerned, the Netherlands position was once again being examined by the Commission and that, pending such examination, the time-limit of two months provided for in the reasoned opinion for the necessary

measures to be adopted was suspended. It is agreed that that letter reached the Commission department concerned but was never answered.

Admissibility

8 Referring to the above-mentioned letter of 24 February 1983, the Netherlands Government contends that as a result of interviews with Commission officials it was justified in believing that the time-limit of two months fixed in the reasoned opinion was to be suspended until the Commission had completed its examination of the worked examples which had been submitted. It questions whether, under those circumstances, the condition laid down in Article 169, to the effect that an application to the Court may be made only if the State concerned does not comply with the opinion within the period laid down by the Commission, was fulfilled.

9 The Commission replies that its officials gave no undertaking that the time-limit in question would be suspended and in any case they had no authority to do so. According to the Commission, the letter from the Netherlands Minister for Finance, which was not officially addressed to it and did not raise any new factor, did not require any reply.

10 On that point it must be noted that in fact the Commission contributed to the misunderstanding by failing to reply to the letter dated 24 February 1983 which indicated clearly that the Netherlands Government considered that the time-limit fixed in the reasoned opinion had been suspended. Nevertheless, however regrettable such an omission may be, it does not in itself suffice to vitiate the procedure under Article 169. That article expressly provides that the Commission is to lay down the period within which the reasoned opinion must be complied with, and it is therefore for the Commission to decide whether or not to grant a request from a Member State for the time-limit to be suspended. It follows that the Government of a Member State is not justified in believing, merely on the basis of interviews with Commission officials or the Commission's failure to reply to letters sent to it, that the time-limit laid down in the reasoned opinion is suspended. Moreover, the Netherlands Government has neither shown nor even alleged that its misunderstanding on that point has in any way restricted its ability to defend itself against the application.

11 The application must therefore be regarded as admissible.

Substance

12 The Commission claims that the value of goods accepted as part-payment by the supplier of other goods is part of the consideration obtained by the supplier from the purchaser for the goods supplied. According to Article 11 of the Sixth Directive, that value therefore forms part of the taxable amount for the goods supplied. In the Commission's opinion, Article 32 refers to special systems applicable to second-hand goods and certainly does not permit any derogation from the rules relating to the taxable amount for new goods. Furthermore, none of the proposals made by the Commission with a view to establishing a common system for the taxation of second-hand goods permits a derogation of that kind. Unlike those proposals, the Netherlands system does not benefit the ultimate purchaser of the second-hand goods so much as the purchaser of the new goods, who is thereby directly accorded a reduction in VAT.

13 According to the Netherlands Government, the purpose of the system at present in force in the Netherlands is precisely that referred to by Article 32 of the Sixth Directive and by the proposals submitted to the Council by the Commission. In its view, it has demonstrated by means of worked examples that the application of that system in practice leads to exactly the same results as the systems proposed by the Commission. The Commission's action is in reality based solely on a formalistic interpretation of Article 11 of the Sixth Directive. If it were to succeed, the Kingdom of the Netherland would be compelled to abolish all special rules for the taxation of second-hand goods, which would be contrary to the aims of Article 32 and of the proposals which the Commission itself has submitted. As regards the trade in motor cars, in particular, the number of direct supplies between consumers would then increase, to the detriment of professional traders.

14 In order to resolve this divergence of views, it is necessary first to examine more closely the difficulties ensuing from the VAT system established by the general rules set out in the Community directives for the market in second-hand goods and the various measures which have been proposed or implemented in order to overcome them.

15 By virtue of Article 2 of the First Council Directive, No 67/227/EEC of 11 April 1967 (Official Journal, English Special Edition 1967, p. 14), the principle of the common system of value-added tax consists in the application to goods and services up to and including the retail stage of a general tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which tax is charged. However, VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the cost of the various price components. As regards goods, the chargeable event is the supply of goods for valuable consideration by a taxable person acting as such and only taxable persons are authorized to deduct from the VAT for which they are liable the tax already charged on the goods at a previous stage.

16 It follows that the goods are in fact taxed at each stage of production and distribution only on the basis of the value added at that stage. After reaching the final consumer who is not a taxable person, the goods remain burdened with an amount of VAT proportional to the price paid by that consumer to his supplier.

17 If the consumer subsequently supplies the goods to another non-taxable consumer, no tax is charged or deducted in respect of that transaction. If the consumer supplies the goods to a taxable trader, such supply does not give rise to a charge to tax either, but where the goods are resold by the taxable person an amount of VAT proportional to the resale price is charged, without the taxable person being entitled to any deduction of the VAT which the goods have already borne.

18 Second-hand goods which are reintroduced 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 Article 32 of the Sixth Directive provides that the Council will at a later stage adopt a common system to prevent such distortion in competition and, pending the implementation of such a common system, authorizes the retention of existing national systems having the same objective.

20 For its part, the Commission has acted upon Article 32 of the Sixth Directive by submitting to the Council its Proposal for a Seventh Directive which sets out two methods of achieving the desired result. As regards second-hand goods in general, the proposal provides that where the supply is effected by a taxable person wishing to resell goods which he acquired from a non-taxable person, the taxable amount is to be a fixed proportion of the resale price which is deemed to correspond to the value added by the taxable person wishing to resell. In relation to certain second-hand goods which play an important part in trade, in particular motor cars, the proposal puts forward a scheme which is more specific as to the results to be achieved. Under that system, when a taxable person resells such goods he is entitled to deduct an amount of VAT calculated on the basis of the price at which the goods were acquired from a non-taxable person. The two schemes proposed thus have one feature in common, namely that it is at the time of resale that the residual part of the VAT borne by the second-hand goods is taken into account.

21 Under the Netherlands system, account is taken of that residual part at an earlier stage, when the second-hand goods are acquired by the taxable person by means of a trade-in. That system only gives the appearance of resulting in a reduction of the taxable amount for the new goods. The reduction is exactly proportional to the price paid by the taxable person for the second-hand goods which he buys from the non-taxable person and in fact offsets the residual part of the VAT which the second-hand goods have already borne. As the goods have already benefited from a remission of tax on the occasion of their acquisition by the taxable person wishing to resell, tax may be charged in the normal manner when the goods are resold without distorting competition with direct sales between consumers.

22 It is immaterial that, strictly speaking, that arrangement directly benefits the purchaser of the new goods, who is also the seller of the second-hand goods, whereas in the schemes proposed by the Commission the reduction of tax on the occasion of resale directly benefits the non-taxable purchaser of the second-hand goods. As has been shown by the worked examples submitted to the Court by the

Netherlands Government, the prices agreed between the parties to the two transactions involving such goods tend to be adjusted according to the system applied so as to lead generally to the same result both for the three parties to the transactions and for the Exchequer; the only differences concern the time at which the second-hand goods benefit from remission of the residual part of VAT and the break-down of the prices. Similarly, all three systems examined re-establish neutrality of competition between direct sales from one consumer to another and transactions through commercial channels.

23 It is in the light of those considerations that it must be decided whether, as the Commission maintains, the Netherlands system constitutes a derogation from Article 11 of the Sixth Directive which cannot be justified under Article 32 of that directive. The examination set out above shows that that system is not designed to exempt from tax part of the consideration obtained by the taxable person wishing to resell for the supply of new goods, nor does it have such an effect. On the contrary, the object and effect of the Netherlands system is to offset the residual part of the VAT already borne by the second-hand goods traded in, so that on resale those goods may be subject to the general system of VAT. It follows that the Netherlands system is in principle covered, both as regards its object and its effects, by Article 32 of the Sixth Directive and that it does not infringe Article 11 of the directive.

24 The Commission has set out other complaints against the Netherlands system. It claims that the system does not concern all purchases of used goods by a taxable person from a non-taxable person by way of a trade-in; it extends in principle, if not in practice, to the part-exchange of new goods and leads to a loss of VAT and hence to a reduction in the Community's own resources if the goods are resold at a price lower than the acquisition price.

25 It is not necessary to examine those complaints in the framework of this action. It was precisely on those points that the Netherlands Government stated during the pre-litigation procedure that it was prepared to consider adjustments to the system, a possibility which the Commission categorically rejected. The Commission is therefore not entitled to rely upon those aspects of the Netherlands rules in these

proceedings. As regards the argument raised by the Commission for the first time in reply to a question put by the Court, to the effect that Article 32 of the Sixth Directive prohibits any amendment of existing national systems, it must be stated that that cannot apply to adjustments whose sole objective is to ensure that a national system entirely conforms to that article, without in any way affecting the principles of the system as it has been applied by the Member State in question since the date of the entry into force of the Sixth Directive.

26 It follows that the Commission's application must be dismissed in its entirety.

Costs

27 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. As the applicant 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.

Mackenzie Stuart Bosco Due Koopmans

Everling Bahlmann Galmot Joliet O'Higgins

Delivered in open court in Luxembourg on 10 July 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President