JUDGMENT OF THE COURT (Fifth Chamber)

8 November 2001 *

In Case C-338/98,

Commission of the European Communities, represented initially by E. Mennens and E. Traversa, and subsequently by E. Traversa and H.M.H. Speyart, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by M.A. Fierstra, C. Wissels and J. van Bakel, acting as Agents,

defendant,

supported by

* Language of the case: Dutch.

United Kingdom of Great Britain and Northern Ireland, represented by M. Ewing, acting as Agent, and N. Pleming QC, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that by providing, in breach of Articles 17(2)(a) and 18(1)(a) 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 (OJ 1977 L 145, p. 1), in the version resulting from Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388 and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18), that an employer who is a taxable person for the purposes of value added tax may deduct part of an allowance paid to an employee for business use of a private car, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty,

THE COURT (Fifth Chamber),

composed of: S. von Bahr, President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, A. La Pergola (Rapporteur), M. Wathelet and C.W.A. Timmermans, Judges,

Advocate General: C. Stix-Hackl,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 April 2001, at which the Commission was represented by H.M.H. Speyart, the Kingdom of the Netherlands by J. van Bakel and the United Kingdom of Great Britain and Northern Ireland by G. Amodeo, acting as Agent, and N. Pleming,

after hearing the Opinion of the Advocate General at the sitting on 31 May 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 September 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that by providing, in breach of Articles 17(2)(a) and 18(1)(a) 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 (OJ 1977 L 145, p. 1), in the version resulting from Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388 and introducing new simplification measures with regard to value added tax — scope of certain

exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18) ('the Sixth Directive'), that an employer who is a taxable person for the purposes of value added tax ('VAT') may deduct part of an allowance paid to an employee for business use of a private car, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty.

2 By order of the President of the Court of 21 April 1999, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Kingdom of the Netherlands.

Community legislation

3 Article 4 of the Sixth Directive states:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

...

4. The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

...'

4 Article 5(1) of the Sixth Directive provides that '"supply of goods" shall mean the transfer of the right to dispose of tangible property, as owner'.

5 Article 17 of the Sixth Directive is headed 'Origin and scope of the right to deduct'. Article 17(2)(a) states:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person'.

6 Article 18, headed 'Rules governing the exercise of the right to deduct', provides:

'1. To exercise his right of deduction, a taxable person must:

(a) in respect of deductions pursuant to Article 17(2)(a), hold an invoice drawn up in accordance with Article 22(3);

...

3. Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2.

...'

7 Article 22(3)(a) provides:

'Every taxable person shall issue an invoice, or other document serving as invoice, in respect of goods and services which he has supplied or rendered to another taxable person or to a non-taxable legal person....

Every taxable person shall likewise issue an invoice in respect of any payment to account made to him before any supplies of goods referred to in the first subparagraph and in respect of any payment to account made to him by another taxable person or by a non-taxable legal person before the provision of services is completed.'

8 Article 22(3)(c) states:

'Member States shall lay down the criteria that shall determine whether a document may be considered an invoice.'

National legislation

9 Article 23 of the Uitvoeringsbesluit omzetbelasting (Implementing decree concerning turnover tax) of 12 August 1968 (*Staatsblad* 1968, No 423), as amended by a decree of 17 December 1997 (*Staatsblad* 1997, No 761) ('the implementing decree of 12 August 1968') provides:

'Without prejudice to Article 15(2) and (5) of the Law, where an employee uses a car belonging to him in connection with his employer's business and receives an allowance from his employer for that purpose, a percentage of the allowance, fixed by the Minister, may be deducted by the employer in so far as the allowance does not fall within income for income tax purposes.'

10 Article 16 of the Uitvoeringsbeschikking omzetbelasting (Implementing order concerning turnover tax) of 30 August 1968 (*Nederlandse Staatscourant* 1968, No 169), as amended by a ministerial decree of 14 October 1998 (*Nederlandse Staatscourant* 1998, No 204), sets the fraction of the allowance which the employer may deduct at 12%.

11 The Netherlands Government states that that percentage corresponds to the weighted average of VAT included in the various cost components relating to possession and use of a car.

12 More specifically, it is apparent from the explanation provided by the Netherlands Government in reply to a question from the Court that, in determining the

percentage, regard was had to the fact that the allowance paid by an employer to his employee is deemed to cover simultaneously expenditure by the employee which was subject to VAT, for example on acquisition of the vehicle and the purchase of fuel and maintenance or repair costs, and expenditure which did not give rise to a VAT charge, such as taxes related to possession of the vehicle or insurance premiums.

13 The Netherlands authorities estimated that expenditure relating to a vehicle which was not subject to VAT accounted on average for roughly 20% to 21.5% of the total expenditure linked to possession and use of the vehicle. In the case of vehicles with a diesel engine, which constituted some 10% of the total number of vehicles in the Netherlands, that average proportion was, however, higher.

14 Since it was considered, on the basis of those premisses, that only 78.5% to 80% of the allowance paid by an employer to his employee was deemed to cover expenditure incurred by the latter which gave rise to a VAT charge at the standard rate of 17.5%, it was calculated that the allowance was accordingly deemed to include an element of VAT previously paid by the employee ranging from 12.08% to 12.28% of the allowance.

15 That percentage was rounded down to 12% in particular in order to take account of the specific circumstances of vehicles with a diesel engine.

16 In reply to a question from the Court, the Netherlands Government added that, while the permitted deductible percentage was changed from 13% to 12% in 1992, that alteration was caused by the reduction from 18.5% to 17.5% in the standard rate of VAT applied in the Netherlands.

17 As regards the amount of the allowance paid to an employee to which the deduction of VAT at the rate of 12% applies, it is apparent from the replies of the Netherlands Government to the questions formulated by the Court and from the hearing that the deduction is allowed by the Netherlands tax authorities where the allowance does not exceed a flat rate of NLG 0.6 per kilometre.

18 On the other hand, it follows from the Wet op de loonbelasting 1964 (Law of 1964 relating to tax on earned income) and the provisions implementing that Law that, where the allowance amounts to more than NLG 0.6 per kilometre, it constitutes an element of remuneration to the corresponding extent.

19 As regards verification, it follows from various domestic tax provisions that employers are required to keep specific accounts regarding allowances paid to employees in respect of use of their private vehicles for the purposes of the business and that such accounts must indicate in particular the number of kilometres in respect of which the allowance is paid. The supporting documents for establishing that the deduction is allowed are not subject to specific formal requirements, but they must contain information relating to the journeys carried out for business reasons, the places visited by the employee and the distances travelled by him; periodical declarations by the employee are required in that last respect.

Pre-litigation procedure

20 By letter of 2 February 1993, the Commission informed the Netherlands Government of its doubts as to the compatibility of Article 23 of the

implementing decree of 12 August 1968 with the Sixth Directive, inasmuch as that provision authorises taxable employers to deduct VAT without fulfilling the condition relating to holding an invoice laid down in Article 18(1)(a) of the Sixth Directive.

21 By letter of 5 July 1993, the Netherlands Government contended that the deduction in question could not be criticised for purely formal reasons linked to the fact that an invoice issued by one taxable person to another was not held. Referring to the judgment in Case 165/86 *Intiem* [1988] ECR 1471, the Netherlands Government maintained that it mattered only that the expenditure to which the deduction related was incurred, as here, for the purposes of the taxable employer's business.

22 On 10 May 1995 the Commission sent a letter of formal notice to the Kingdom of the Netherlands. While appearing to accept that the expenditure in respect of which the deduction at issue applied was of a business nature and, therefore, that the deduction did not undermine the principle set out in Article 17(2)(a) of the Sixth Directive, the Commission again dwelt on the requirement to hold an invoice laid down in Article 18(1)(a) of that directive. It pointed out that compliance with such a requirement constituted a guarantee of legality and transparency enabling fraud to be combated effectively.

23 After the Netherlands Government had repeated its view in a letter of 10 July 1995, the Commission sent it a supplementary letter of formal notice dated 17 October 1996. Stating that it had carried out a more detailed examination of the Netherlands legislation at issue, the Commission developed its line of argument in that letter. It maintained in particular that the right to deduct at issue also infringed Article 17(2)(a) of the Sixth Directive in that the

supplies in question were not made in favour of the taxable employer by another taxable person, but to an end consumer, namely the employee. The tax paid by the employee therefore had to remain borne by him, while the allowance paid by the employer to the employee, which did not constitute consideration for a taxable transaction, fell outside the scope of VAT.

24 While acknowledging that the Netherlands legislation at issue could appear contrary to the letter of Articles 17(2)(a) and 18(1)(a) of the Sixth Directive, the Netherlands Government contended, in its reply of 16 December 1996, that the legislation was nevertheless consistent with the principles governing VAT and that those principles had to prevail over the text of the Sixth Directive. In particular, the right to deduct at issue related to goods and services linked to a taxable employer's business activity and enabled cumulative taxation undermining the neutrality of the tax to be avoided.

25 The Commission sent a reasoned opinion to the Kingdom of the Netherlands on 22 September 1997. It called on the Kingdom of the Netherlands to take the measures necessary to comply with the opinion within two months of notification thereof.

26 By letter of 28 November 1997, the Netherlands Government replied to the Commission, essentially confirming its position. It expanded in particular the argument that the Netherlands legislation provides the necessary guarantees in order to prevent any fraudulent use of the flat-rate deduction mechanism at issue.

27 Since the Commission found that the Kingdom of the Netherlands had not complied with its reasoned opinion, it decided to bring the present action.

The present action

The first complaint, alleging infringement of Article 17(2)(a) of the Sixth Directive

Arguments of the parties

28 The Commission submits that a fundamental aspect of the VAT system which has been created is that transactions capable of giving rise to a deduction are carried out between taxable persons, all the taxable transactions together forming an unbreakable chain in that regard. That follows in particular from Article 17(2)(a) of the Sixth Directive, which states that deductible VAT is that due or paid in respect of goods or services supplied — to a taxable person or for his purposes — by another taxable person.

29 Given the clear wording of that provision, any derogation from the principle which it lays down can emanate only from the Community legislature. In addition, it is particularly necessary to adhere to the wording of the Sixth Directive in this regard because, first, all tax legislation requires a clearly defined scope and precise rules and, second, to allow a departure from that wording would result in the Community legislation being applied differently in the various Member States.

30 The Commission maintains that here the goods and services to which the deduction mechanism set up by Article 23 of the implementing decree of 12 August 1968 relates are not supplied to a taxable employer but to an employee, and that the employee is an end consumer not accountable for VAT

who uses the vehicle in addition, if not mainly, for private purposes. To that extent, the part of the allowance paid by the employer which may be deducted under the abovementioned national provision is not tax on a transaction between taxable persons, but a flat-rate allowance intended to cover part of the VAT charged on goods or services supplied to an end consumer.

31 The Netherlands Government contends that the right to deduct provided for in Article 23 of the implementing decree of 12 August 1968 is fully consistent with the objectives pursued by the common system of VAT.

32 That system is intended to allow every taxable person to be fully relieved of the burden of input tax incurred for the purposes of his business, thereby ensuring that all economic activities, whatever their purpose or results, are taxed in a wholly neutral way (Case 268/83 *Rompelman* [1985] ECR 655).

33 The reimbursement of expenditure incurred by an employee for the purposes of his employer's business clearly constitutes for the employer a cost burden affecting the final price of the products or services which he offers in his activity as a taxable person, so that he must be able to deduct the VAT element contained in that reimbursed expenditure. Not to allow such a deduction would amount to treating economically identical situations in opposite ways by reason of purely formal differences, according to whether the employee uses his own vehicle or his employer's in order to render services in connection with the latter's business, an outcome which is not acceptable having regard to the Court's case-law (see Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229). Distortions of competition would inevitably also result.

34 According to the Netherlands Government, not to allow the deduction at issue would also give rise to double taxation. Initially, VAT is definitively imposed on

the expenditure incurred by the employee in relation to his vehicle. Subsequently, it is charged on the final price of the products or services offered by the taxable employer, the final price having as a component the abovementioned expenditure following its reimbursement by the employer.

35 Such a position would undermine the principle of fiscal neutrality, the principle that there should be no double taxation and the principle that only the end consumer should be taxed, all of which are objectives pursued by the Sixth Directive.

36 As regards the judgment in *Intiem*, cited above, in which the Court accepted that VAT was deductible where it was paid by one taxable person to another taxable person with whom he had concluded an agreement under which the latter provided petrol to his employees, the Commission and the Netherlands Government each maintain that it supports their own argument.

37 For the Commission, three factors considered decisive by the Court in *Intiem* are missing in the present case. First, there is no agreement concluded between a taxable employer and another taxable person for the supply of goods to his employees on his behalf or, therefore, a supply in the legal sense to him. Second, the goods concerned by the right to deduct at issue are not intended to be used exclusively for the business of the taxable employer. Third, the taxable employer is not invoiced by a taxable supplier.

38 Conversely, the Netherlands Government regards the judgment in *Intiem* as confirmation that, when interpreting Article 17(2)(a) of the Sixth Directive, it is necessary above all to give priority to economic reality.

39 The United Kingdom Government argues that the present case concerns a more general issue, namely a taxable person's right to deduct the VAT element of all expenses incurred by his employees in connection with the economic activity of the undertaking. It refers, by way of example, to accommodation, food or transport costs borne by an employee when on a business trip, or the purchase of a tool by an employee working on a site away from the employer's premises.

40 The United Kingdom Government refers in this regard to the widespread practice in that Member State of employers' reimbursing, by payment of an allowance which depends on the distance travelled, the cylinder capacity of the vehicle and the real national average cost of fuel, expenditure on fuel by employees who use their vehicle for the purposes of their employer's business, and then deducting the related VAT.

41 A system of that kind is fully justified in view of the fact that it enables the taxable person to avoid checking and retaining a large number of receipts, a burden considered disproportionate to the amounts of tax involved. In addition, a requirement that the fuel be supplied directly to the employer would penalise the smallest undertakings, because they would not be able to make supply arrangements with fuel distributors.

42 In conclusion, the United Kingdom Government contends that the only guide should be economic reality: a taxable person applying a reimbursement system in reality acquires fuel through his employees, without the question of ownership of the vehicle having any relevance in that regard.

Findings of the Court

43 In order to establish whether the national provisions at issue are consistent with Article 17(2)(a) of the Sixth Directive, it should first be recalled that, as the Court has previously held, Article 17(1) and (2) of the Sixth Directive specifies the conditions giving rise to the right to deduct VAT and the extent of that right and that provision does not leave the Member States any discretion as regards its implementation (Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 35).

44 Next, it follows from the wording of Article 17(2)(a) of the Sixth Directive that the right to deduct which that provision confers on a taxable person concerns VAT paid in respect of goods and services supplied to that taxable person by another taxable person.

45 Article 4(1) and (4) of the Sixth Directive expressly states that an employee acting for his employer cannot have the status of taxable person.

46 It follows from this provision that the fact an employee uses his own vehicle in connection with his employer's business cannot have the effect of transforming the employee into a 'taxable person' within the meaning of the Sixth Directive or, therefore, Article 17(2)(a) thereof, even if the costs linked to such use give rise to reimbursement by the employer.

47 Also, under Article 5 of the Sixth Directive, the supply of goods means the transfer of the right to dispose of them as owner. It is clear that use by an

employee of his own vehicle in connection with his employer's business cannot constitute a supply, in that sense, to his employer.

48 Accordingly, neither the vehicle belonging to the employee nor the fuel consumed by that vehicle can be regarded as 'supplied' to the taxable employer, within the meaning of Article 17(2)(a) of the Sixth Directive, simply because depreciation of the vehicle and fuel costs linked to such use give rise to partial reimbursement by the employer.

49 The foregoing considerations thus clearly show that it is impossible to derive from the wording of Article 17(2)(a) of the Sixth Directive a right to deduct VAT in the circumstances referred to in Article 23 of the implementing decree of 12 August 1968.

50 Contrary to the submissions of the Netherlands Government, a different conclusion cannot be drawn from the judgment in *Intiem*, cited above.

51 It is apparent from paragraph 14 of that judgment that the Court held in *Intiem* that it was only as far as possible that the VAT deduction system laid down by the Sixth Directive had to apply in such a way that its scope corresponded to the sphere of the taxable person's business activity.

52 It is in fact clear from paragraph 16 of that judgment that, while the Court was able to adopt an interpretation of Article 17(2)(a) of the Sixth Directive which had the effect of confirming that the deduction mechanism at issue in the main proceedings was consistent with that provision, that was so in particular because,

in that case, the employer had arranged for goods to be supplied at his expense to his employees and he had consequently received from the supplier invoices charging him VAT in respect of the goods supplied.

53 In such circumstances, the conditions for operation of Article 17(2)(a) of the Sixth Directive, and in particular the condition requiring a supply between taxable persons, were clearly satisfied, so that it was in fact possible to apply that provision.

54 By contrast, with regard to the deduction mechanism at issue in the present case, it has been explained above that, since the condition requiring a supply between taxable persons is not fulfilled, it does not appear possible to reconcile that mechanism with the wording of Article 17(2)(a) of the Sixth Directive.

55 It is true that the solution thus imposed by the wording of Article 17(2)(a) of the Sixth Directive may not appear fully consistent with the purpose of that provision and with certain objectives pursued by the Sixth Directive, such as fiscal neutrality and the avoidance of double taxation.

56 The fact remains, however, that, in the absence of intervention by the Community legislature, the system for deduction of VAT which it has created, as defined by the Sixth Directive, does not provide any basis for a right entitling taxable persons to deduct VAT in the circumstances referred to in Article 23 of the implementing decree of 12 August 1968 or enable any detailed rules for the application of such a right to be established (see, by analogy, Case C-165/88 *ORO Amsterdam Beheer and Concerto* [1989] ECR 4081, paragraphs 16, 22, 23 and 24).

57 It is also to be observed in this last respect that the detailed rules for applying the deduction mechanism founded on Article 23 of the implementing decree of 12 August 1968 make the mechanism an imprecise, flat-rate one, so much so that they do not in any way guarantee that the VAT deemed to be contained in the allowance paid by an employer to his employee actually corresponds to VAT paid by the employee in respect of acquisition of the vehicle or of expenditure linked to its use for the purposes of the employer's business.

58 First of all, it follows from paragraphs 12 to 15 of this judgment that the method for determining the percentage of the allowance paid to the employee that may be deducted by the employer is based on an approximation of the proportion of the expenditure linked to a vehicle which is not subject to VAT and of the expenditure which is and that the rate thus obtained was rounded down to 12% in order to take account of the particular circumstances of vehicles with a diesel engine.

59 Secondly, the imprecise nature of the deductible percentage is also apparent from the fact that, as explained in paragraph 16 of this judgment, that rate was reduced from 13% to 12% because the standard rate of VAT applicable in the Netherlands was changed from 18.5% to 17.5%. No account was therefore taken at the time of the fact that the 1% decrease in the standard rate of VAT had no effect on expenditure linked to the vehicle which is not subject to VAT.

60 Finally, it is apparent from paragraphs 17 and 18 of this judgment that the allowance paid to an employee in respect of which the deduction may be made is itself a flat-rate one, since an employer is permitted to deduct 12% of that allowance in so far as it does not exceed NLG 0.6 per kilometre travelled, irrespective of the level of the expenditure, and therefore of the VAT, actually borne by the employee in relation to the purchase and use of his vehicle.

61 The foregoing considerations reinforce the conclusion that intervention by the Community legislature would be necessary both in order to allow in principle a right to deduct VAT on the basis of an allowance paid to an employee using his vehicle for the purposes of a taxable employer's business and in order to establish the extent of such a right and the detailed rules for its application.

62 The Commission's first complaint must accordingly be held well founded.

The second complaint, alleging infringement of Article 18(1)(a) of the Sixth Directive

Arguments of the parties

63 The Commission submits that the implementing decree of 12 August 1968 also infringes Article 18(1)(a) of the Sixth Directive inasmuch as, under that provision, input tax may be deducted only if the taxable person holds an invoice drawn up in accordance with Article 22(3) of that directive, that is to say, in essence, an invoice issued by one taxable person to another taxable person. Where a deduction relates to an allowance paid to an employee intended to cover the costs linked to use of his private vehicle, it is not possible for such an invoice to be held.

64 The Netherlands Government contends, first, that the requirement to hold an invoice laid down by the provisions referred to in the previous paragraph was

imposed for evidential purposes and that the Sixth Directive allows other methods of proof, as shown by Article 18(3) which permits Member States to determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with Article 18(1) and (2).

65 Secondly, the reference in Article 18(1)(a) of the Sixth Directive to Article 22(3) does not mean that the invoice, assuming it to be indispensable, must be an invoice issued by one taxable person to another taxable person, since Article 22(3)(b), which specifies the information that must appear on an invoice, imposes no such requirement.

66 Finally, it is in any event apparent from Article 22(3)(c) of the Sixth Directive that the Member States are entitled to derogate from the requirements of Article 22(3)(a) and provide that documents other than an invoice may be permitted for the purpose of proving that an item of expenditure has actually been incurred for the taxable person's purposes.

67 Be that as it may, according to the Kingdom of the Netherlands the objectives and general scheme of the Sixth Directive must prevail over a purely formal requirement such as the holding of an invoice, in particular where it appears that such an invoice cannot be obtained and other means of proof, for example those referred to in paragraph 19 of this judgment, exist and enable fraudulent practices to be prevented.

68 The Commission contends that the document referred to in Article 22(3)(c) of the Sixth Directive which may be considered to be an invoice must in any event be delivered by one taxable person to another taxable person, as is clear from

Article 22(3)(a). In addition, Article 22(3)(c) requires the Member State to have specified the criteria which such a document must fulfil.

69 As to the power conferred on the Member States by Article 18(3) of the Sixth Directive, the Commission considers that it can be exercised only in respect of transactions giving rise to a right to deduct, which is not the case with transactions occurring, as in the present case, between a taxable employer and his non-taxable employee.

70 Like the Netherlands Government, the United Kingdom Government submits that Article 18(3) of the Sixth Directive authorises the Member States to lay down special rules to regulate the right to deduct in cases where an invoice cannot be presented.

Findings of the Court

71 Article 18 of the Sixth Directive relates solely to the conditions governing exercise of the right to deduct, the actual existence of such a right being dealt with in Article 17.

72 As is apparent from the consideration of the Commission's first complaint, it is contrary to Article 17(2)(a) of the Sixth Directive for a taxable employer to deduct part of an allowance paid to an employee for business use of a private car.

73 To that extent, Article 18(3) of the Sixth Directive, which allows the Member States to determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with the detailed rules prescribed by Article 18(1) and (2), cannot be relied on by a Member State seeking to regulate the conditions governing the exercise of a right to deduct that is not permitted under the Sixth Directive.

74 With regard to Article 18(1)(a) and Article 22(3)(a) and (c) of the Sixth Directive, it is apparent from the wording of those provisions that, in order to make the deduction referred to in Article 17(2)(a) of that directive, the taxable person must in principle hold an invoice or a document considered to be an invoice, issued to him by another taxable person.

75 The inevitable conclusion is that, in the absence of any supply of goods or services between two taxable persons and, therefore, of any possibility of an invoice or a document considered to be an invoice being delivered by one such taxable person to another, the deduction of VAT authorised under Article 23 of the implementing decree of 12 August 1968 can, by definition, only occur in breach of the requirements laid down for exercise of a right to deduct by Article 18(1)(a) of the Sixth Directive.

76 The Commission's second complaint must accordingly be held well founded.

77 It follows from all of the foregoing considerations that by providing, in breach of Articles 17(2)(a) and 18(1)(a) of the Sixth Directive, that an employer who is a

taxable person for the purposes of VAT may deduct part of an allowance paid to an employee for business use of a private car, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty.

Costs

78 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs. Furthermore, as provided in Article 69(4) of the Rules of Procedure, Member States and institutions which intervene in proceedings are to bear their own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that by providing, in breach of Articles 17(2)(a) and 18(1)(a) 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, in the version resulting from Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388 and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them, that an employer who is a taxable person for the purposes of value added tax may deduct part of an allowance paid to an employee for business use of a private car, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty;

2. Orders the Kingdom of the Netherlands to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

von Bahr Edward La Pergola

Wathelet Timmermans

Delivered in open court in Luxembourg on 8 November 2001.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber