of the goods when they are imported; that value is to be determined on the basis of the relevant data in the exporting Member State.

The amount of the tax paid in the exporting Member State which is still contained in the value of the goods when they are imported is equal:

(a) to the amount of tax actually paid in the exporting Member State less a percentage representing the proportion by which the goods have depreciated, if the value of the goods has decreased between the date on which tax was last charged in the exporting Member State and the date of importation;

(b) to the full amount of tax actually paid in the exporting Member State, if the value of the goods has increased over the same period.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 28 November 1985 *

Mr President,
Members of the Court,

1. In the three questions which it has referred to this Court on the subject of value-added tax (VAT), the tribunal d'instance of Bordeaux asks in substance:

(1) Whether, for the purposes of charging imported goods to value-added tax, it is 'necessary to draw a distinction according to whether or not the transaction is effected for consideration';

(2) If not, whether the taxable amount which must be applied is 'the product's value inclusive of all taxes in the exporting State, less the residual part of the value-added tax still contained in the value of the product when it is imported' or 'the value net of tax of a similar product in the importing State';

(3) Whether the amount of value-added tax payable in the importing State is to be calculated

(a) 'on the basis of a differential rate (the rate charged in the importing State less the rate charged in the exporting State)', or

(b) by setting off 'the residual part of the value-added tax paid in the exporting Member State (...) still contained in the value of the product when it is imported ... against the amount of value-added tax charged on importation', or

(c) where appropriate, taking account of the reimbursement of the residual part by the exporting Member State.

2. Those questions were raised in proceedings relating to value-added tax charged by the French customs adminis-

* Translated from the French.

tration on a second-hand vehicle imported from Belgium by a national of that Member State residing in France. In all essential respects they have already been answered by the Court's two *Schul* judgments, the first of which was delivered on 5 May 1982 (Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, hereinafter referred to as '*Schul I*') and the second on 21 May 1985 (Case 47/84 *Staatssecretaris van Financiën* v *Schul* [1985] ECR 1501, hereinafter referred to as '*Schul II*').

The tribunal d'instance was indeed not under any misapprehension about this because the grounds of its judgment refer expressly to the first of those decisions, while asserting with regard to the second, which had not yet been handed down when the reference was made, that the Hoge Raad [Supreme Court] of the Netherlands had referred to the Court a number of questions for a preliminary ruling because of the difficulties occasioned by the application of *Schul I*.

Nor do I think that anything in the written or the oral observations presented in this case justifies a reconsideration of the principles laid down in the Court's judgments, because in essence they rehearse arguments which the Court has already heard and either upheld or rejected.

I shall, therefore, be considering only the specific legal aspects of this case that require a separate answer from the Court.

3. With regard to *Question 1*, Mrs Bergeres-Becque, who is the plaintiff in the main action, the Netherlands and the Commission take the view that the fact that the imported goods were not transferred for consideration does not call in question the application of the principles enunciated by the Court in *Schul I* and *Schul II*.

A different view is taken by the French Government, which intervened at the hearing; it states that the importer of goods transferred without consideration is not entitled to the deduction of the VAT paid in the exporting Member State in view of the fact that he has not himself had to pay that tax when acquiring the goods.

I am unable to accept that interpretation. Imported second-hand goods which are the subject of a gift are still inevitably burdened by the VAT originally paid on them in the exporting Member State. If the part of the VAT still contained in the value of the goods at the time of importation were not taken into account, the imported goods might well be subject to an overlapping of VAT in so far as the transfer of a similar article between private persons within the importing Member State, whether or not for consideration, does not give rise to further taxation (*Schul I*, cited above, at paragraphs 15, 31 and 34 of the decision).

With regard to that point, the Court has inferred from the Sixth Council Directive on VAT (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, Official Journal 1977, L 145, p. 1), and Article 2 (2) and Article 7 of the directive in particular, that

'as regards *imports* the chargeable event is constituted *by the mere entry of the goods into the territory of a Member State* whether or not there is a transaction, and irrespective of whether the transaction is carried out *for valuable consideration or free of charge*, be it by a taxable person or a private person' (*Schul I* at paragraph 14 of the decision, emphasis added),

whereas, in the case of transactions *within* a Member State, the event giving rise to the charge is the supply of goods *for consideration* by *a taxable person, acting as such.*

In other words, since importation is the sole chargeable event where goods are imported, the actual circumstances in which the

property in the imported goods is transferred are scarcely relevant. Consequently the principles established in the Court's judgments in *Schul I* and *Schul II* with regard to the importation of goods acquired for consideration are also applicable to goods transferred by way of gift.

4. In answering *Question 2*, it is necessary to bear in mind that, as I have already indicated, the Court ruled in *Schul II* that the part of the VAT paid in the exporting Member State with which the goods are still burdened at the time of importation

'does not form part of the taxable amount for the purposes of VAT payable on importation, since the taxable amount for similar domestic products is also an amount net of tax' (*Schul II* at paragraph 21 of the decision; see also paragraph 23).

However, that answer alone does not deal with all the issues raised by the tribunal d'instance of Bordeaux; there are two problems outstanding.

In the first place, the tribunal d'instance, both in the wording of Question 2 and in the grounds of its judgment, raises the question whether the taxable amount must be established on the basis of the value of the goods in the *importing* Member State. According to the observations of the plaintiff in the main proceedings, which were not disputed on this point, the practice of the French customs administration is to determine the value of the imported vehicle on the basis of the 'argus' price (a published price quotation for second-hand cars) in France.

Secondly, since no selling price was fixed in this case because the imported article was a gift, it is necessary to consider how to determine the price of the imported article. That difficulty is dealt with expressly by Article 11 (B) of the Sixth Directive, the relevant part of which provides as follows:

'(1) The taxable amount shall be:

...

(b) the open market value, where no price is paid ....

"Open market" value of imported goods shall mean the amount which an importer at the marketing stage at which the importation takes place would have to pay to a supplier at arm's length in the country from which the goods are exported at the time when the tax becomes chargeable under conditions of fair competition to obtain the goods in question.'

In such circumstances, the Member States are given an alternative by Article 11 (B) (2), which provides that they 'may adopt as taxable amount the value defined in Regulation (EEC) No 803/68', namely the customs value of the goods. The regulation referred to was subsequently replaced by Regulation No 1224/80, which entered into force on 1 July 1980 (Article 22 (1) and (2) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes, Official Journal 1980, L 134, p. 1). Articles 2 to 7 of that regulation set out the various ways of determining that value.

Those provisions make it possible to resolve the other difficulty which was raised: whether the value of the imported goods is the 'open market' or 'customs' value, it is determined *in the exporting Member State*, in this case Belgium. That criterion is consistent with the logic of the tax which is levied on consumption.

Furthermore, that is the reasoning which underlies the Court's judgments in *Schul I* and *Schul II*. The Court decided that, for

the purposes of determining the taxable amount, the residual VAT paid in the State of exportation should be deducted from the value of the imported goods. That method implies that the value to be taken as a point of reference is the value in the Member State of exportation.

Having said this, I should add that as the Court stated,

'it is for the person who seeks exemption from or a reduction in the value-added tax normally levied on importation to establish that he satisfies the conditions for such exemption or reduction. Accordingly it is open to the Member State of importation to require such an importer to provide the necessary documentary proof that the value-added tax was levied in the Member State of exportation and still burdens the product on importation' (*Schul I*, at paragraph 36 of the decision).

5. By *Question 3*, the tribunal d'instance of Bordeaux seeks the Court's guidance on the detailed rules for the application of VAT in the importing Member State.

On that point, suffice it to point out that the principle adopted by the Court in *Schul I* requiring the VAT levied in the Member State of exportation to be taken into account obliges the customs authorities in the Member State of importation to deduct from the amount of VAT payable on importation only

'the residual part of the value-added tax of the Member State of exportation which is still contained in the value of the product when it is imported. The amount of this reduction may not, however, be greater than the amount of value-added tax actually paid in the Member State of exportation' (*Schul I*, at paragraph 34 of the decision).

That is precisely the point which the Hoge Raad of the Netherlands asked the Court to clarify in the *Schul II* case. As I had advocated in my opinion, the Court held that the amount of VAT paid in the exporting Member State and still contained in the value of the goods at the time of their importation (residual VAT) was equal:

'in cases in which the value of the goods has *decreased* between the date on which VAT was last charged in the Member State of exportation and the date of importation: to the amount of VAT actually paid in the Member State of exportation, less a percentage representing the proportion by which the goods have depreciated;

in cases in which the value of the goods has *increased* over that same period: to the full amount of VAT actually paid in the Member State of exportation' (*Schul II*, at paragraph 34; emphasis added).

That method confirms, if confirmation be necessary, that the value of the goods must be assessed in that Member State. As interpreted by paragraph 34 of each of the two *Schul* decisions, it is arrived at — once the value of the imported goods less residual VAT has been established — by deducting from the amount of VAT chargeable in principle in the Member State of importation the amount of the part of the VAT paid in the Member State of exportation which is still contained in the value of the goods. To me that interpretation appears sufficient to dispel the uncertainties voiced by the tribunal d'instance and to provide clear guidance for the practice to be followed in this respect by the customs authorities.

6. I therefore propose that the Court answer the questions referred to it by the tribunal d'instance of Bordeaux as follows:

(1) For the purposes of VAT charged on imports, the chargeable event is the entry of the goods into the territory of the Member State, irrespective of whether or not the transaction is effected for consideration.

(2) The taxable amount for calculating VAT in the Member State of exportation consists in the value of the goods in the Member State of exportation as determined in accordance with the provisions of Article 11 (B) of the Sixth Directive (Directive 77/388/EEC of 17 May 1977), less the VAT of the Member State of exportation still contained in that value.

(3) The amount of the VAT paid in the Member State of exportation which must be deducted from the VAT payable in the Member State of importation is equal:

(i) in cases in which the value of the goods has *decreased* between the date on which VAT was last charged in the Member State of exportation and the date of importation: to the amount of VAT actually paid in the Member State of exportation, less a percentage representing the proportion by which the goods have depreciated;

(ii) in cases in which the value of the goods has *increased* over that same period: to the full amount of VAT actually paid in the Member State of exportation.