

## COUNCIL DECISION

of 8 July 1996

**authorizing the Netherlands to apply a measure derogating from Article 11 of Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes (Sixth VAT Directive)**

(96/432/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to 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 <sup>(1)</sup>, and in particular Article 27 thereof,

Having regard to the proposal from the Commission,

Whereas, pursuant to Article 27(1) of Directive 77/388/EEC, the Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce special measures for derogation from that Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance;

Whereas, by registered letter to the Commission dated 13 August 1993, the Netherlands requested authorization to introduce a measure derogating from Articles 11 and 20 of the said Directive;

Whereas, in accordance with Article 27(3) of the said Directive, the other Member States were informed on 13 September 1993 of the request made by the Netherlands;

Whereas, since it had serious objections to the Dutch Government's request, the Commission, acting under Article 27(4) of the said Directive, requested by letter dated 11 November 1993 that the matter be raised by the Council;

Whereas the Dutch Government subsequently amended its request, reducing considerably the scope of the special measures derogating from the common system of value added tax;

Whereas the request is confined to a measure introducing a minimum taxable amount for the establishment of rights in rem in respect of buildings or parts thereof and the land on which they stand where the party acquiring

the rights is a non-taxable legal person or a taxable person carrying on exempted activities that do not entitle him to deduct VAT;

Whereas under Article 5(3) of Directive 77/388/EEC the Netherlands considers the establishment of rights in rem to be a supply of goods;

Whereas, availing itself of the possibility open to it under Article 13(C)(b) of the said Directive, the Netherlands allows taxable persons to opt for taxation of the establishment of rights in rem in respect of buildings or parts thereof and the land on which they stand other than those referred to in Article 4(3)(a) of the said Directive; whereas the derogation therefore also relates to such transactions;

Whereas, by taking the open market value as the taxable amount for certain supplies, the proposed measure derogates from Article 11(A)(1)(a) of the said Directive, which provides that the taxable amount for supplies of goods is to be everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser or a third party for such supplies, including subsidies directly linked to the price of such supplies;

Whereas the derogation is aimed at preventing the tax avoidance which takes place when the contracting parties agree on an abnormally low price for the establishment of rights in rem, which attracts VAT, and compensation for this price in the form of a high price for the freehold sale of the property, which is exempt from VAT;

Whereas the special measure is to apply only in cases where the administration is able to prove that the taxable amount determined in accordance with Article 11(A)(1)(a) of the said Directive is abnormally low; whereas the administration may not act on mere presumptions, and the parties concerned must be allowed to adduce evidence to the contrary where they dispute the level of the open market value established by the administration;

Whereas, given the limited scope of the derogation, the special measure is proportionate to the aim pursued;

Whereas the authorization is granted temporarily, thereby enabling the effects of the measure to be assessed once it has been applied for a certain period of time;

<sup>(1)</sup> OJ No L 145, 13. 6. 1977, p. 1. Directive as last amended by Directive 95/7/EC (OJ No L 102, 5. 5. 1995, p. 18).

Whereas the derogation in question has no adverse impact on the European Community's own resources accruing from value added tax,

HAS ADOPTED THIS DECISION:

*Article 1*

By way of derogation from Article 11 (A) (1) (a) of Directive 77/388/EEC, the Netherlands is hereby authorized to take the open market value, as defined in Article 11 (A) (1) (d) of the said Directive, as the taxable amount for the establishment of rights in rem in respect of buildings or parts thereof and the land on which they stand, considered to be tangible property in pursuance of Article 5 (3) of that Directive, where the following two conditions are met:

- the taxable amount determined in accordance with Article 11 (A) (1) (a) of the Directive is abnormally low in comparison with the price that could be obtained

for the property in a transaction between independent parties operating at arm's length,

- the party acquiring the rights in rem is a non-taxable legal person or a taxable person carrying on exempted activities that do not entitle him to deduct VAT.

*Article 2*

This authorization shall be granted until 31 December 1998.

*Article 3*

This Decision is addressed to the Netherlands.

Done at Brussels, 8 July 1996.

*For the Council*

*The President*

R. QUINN

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