COUNCIL DECISION

of 24 May 1989

authorizing the United Kingdom to apply, in respect of certain supplies to unregistered resellers, a measure derogating from Article 11 A (1) (a) of the Sixth Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes

(89/534/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic 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 [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 27 thereof,

Having regard to the proposal from the Commission,

Whereas, under Article 27 (1) of the Sixth Directive, 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 the United Kingdom was authorized by Council Decision 85/369/EEC [2], deemed to have been adopted on 13 June 1985, in accordance with the procedure laid down by Article 27 (4) of the Sixth Directive, to introduce for a two-year period a derogation from the Sixth Directive to combat tax avoidance ;

Whereas certain marketing structures based on sales of goods effected by taxable persons to non-taxable persons with a view to their resale at the retail stage result in avoidance of tax at the stage of final consumption ;

Whereas, in order to prevent such tax avoidance, the United Kingdom applies a measure permitting the tax authorities to adopt administrative decisions the effect of which is to tax supplies made by the taxable persons operating such marketing structures on the basis of the open market value of the goods at the retail stage ;

Whereas that measure constitutes a derogation from Article 11 A (1) (a) of the Sixth Directive, which stipulates that, within the territory of the country, the taxable amount in respect of supplies of goods is 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 ;

Whereas the United Kingdom was authorized by the Council Decision deemed to have been adopted on 25 May 1987 [3] to extend for two years the derogation authorized by Decision 85/369/EEC ;

Whereas the United Kingdom's application for that extension was limited to two years because of the proceedings in Joined Cases 138 and 139/86 : reference to the Court of Justice by the 'London Value Added Tax Tribunal' for a preliminary ruling in the proceedings pending before that Tribunal between 'Direct Cosmetics Ltd' and 'Laughtons Photographs Ltd' against 'Commissioners of Customs and Excise' on the interpretation of Article 27 of the Sixth Directive and on the validity of Decision 85/369/EEC ; whereas, in its judgment of 12 July 1988 [4], the Court of Justice confirmed the validity of that Decision ;

Whereas the United Kingdom, by letter received by the Commission on 24 February 1989, requested authorization to extend the said measure for an indefinite period ;

Whereas, in its judgment of 12 July 1988, the Court of Justice ruled *inter alia* that Article 27 of the Sixth Directive permitted the adoption of a derogating measure such as that at issue on condition that the resultant difference in treatment was justified by objective circumstances ;

Whereas, in order to satisfy itself that this condition is met, the Commission must be informed of any administrative decisions adopted by the tax authorities in connection with the derogation in question ;

Whereas the other Member States were notified of the United Kingdom's request on 22 March 1989 ; whereas the Council Decision is deemed to have been adopted if, within two months of the other Member States being informed, neither the Commission nor any Member State has requested that the matter be raised by the Council ; whereas no such request has been made ; whereas the Council's Decision is thus deemed to have been adopted on 24 May 1989 ;

[1] OJ No L 145, 13. 6. 1977, p. 1.
[2] OJ No L 199, 31. 7. 1985, p. 60.
[3] OJ No L 188, 8. 7. 1987, p. 52.
[4] OJ No C 205, 6. 8. 1988, p. 5.

Whereas the said measure will not have a negative effect on the European Communities' own resources accruing from value added tax,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 11 A (1) (a) of the Sixth Directive, the United Kingdom is hereby authorized to prescribe, in cases where a marketing structure based on the supply of goods through non-taxable persons results in non-taxation at the stage of final consumption, that the taxable amount for supplies to such persons is to be the open market value of the goods as determined at that stage.

Article 2

The United Kingdom shall inform the Commission of any administrative decisions subsequently adopted in connection with the derogation.

Article 3

This Decision is addressed to the United Kingdom.

Done at Brussels, 24 May 1989.

For the Council

The President

C. SOLCHAGA CATALAN