COUNCIL DECISION

of 21 October 2004

authorising the United Kingdom to introduce a special measure derogating from Article 11 of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes

(2004/736/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 harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [1] and in particular Article 27 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) By letter registered by the Secretariat-General of the Commission on 13 February 2004, the United Kingdom sought authorisation to introduce a special measure derogating from Article 1(A)(1)(a) of Directive 77/388/EEC.

(2) The aim of the derogation is to prevent the avoidance of value added tax (VAT) through the undervaluation of supplies. It is specifically designed to prevent the circumvention of Article 6(2) of Directive 77/388/EEC through the practice, within the motor vehicle trade, of allowing staff the use of cars for a nominal charge. Since that charge appears to be consideration for the supply, VAT is levied under Article 11(A)(1)(a) of Directive 77/388/EEC on the actual amount paid by the employee. However, because of the employment ties between the two parties involved, the amount actually paid is artificially low, resulting in significantly smaller VAT revenues.

(3) The United Kingdom has already been granted a request for a derogation from Article 11 designed to tackle the problem of undervalued supplies between connected persons where the recipient of the supply is totally or partially exempt. Since, at the time when that derogation was granted, employees were not included within the definition of 'connected' and since an employee is not a taxable person who is totally or partially exempt, a further and more specific derogation is required.

(4) The special measure should apply only in cases where the administration is able to conclude that the taxable amount, as determined in accordance with Article 11(A)(1)(a), has been influenced by the employment ties between the parties involved. That conclusion should, in each case, be based on manifest facts, not presumptions.

(5) Given the limited scope of the derogation, the special measure is proportionate to the aim pursued.

(6) The derogation has no adverse impact on the Communities' own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 11(A)(1)(a) of Directive 77/388/EEC, the United Kingdom is hereby authorised, until 31 December 2009, in the case of a supply of services consisting in the use of a motor car, where the supplier and the recipient are connected persons in the motor trade, to treat the open market value of that supply as the taxable amount.

Article 2

Article 1 shall apply only if the following conditions are met:

(a) the supplier has the right to deduct, in whole or in part, the value added tax applied to the motor car;

[1] OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2004/66/EC (OJ L 168, 1.5.2004, p. 35).

(b) the recipient is not a fully taxable person and is linked to the supplier by employment ties specified in national legislation;

(c) it is reasonable to conclude from the circumstances of the case that the employment ties referred to in point (b) have influenced the taxable amount, as determined in accordance with Article 11(A)(1)(a) of Directive 77/388/EEC.

Article 3

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Luxembourg, 21 October 2004.

For the Council
The President
G. ZALM