COUNCIL DECISION

of 27 February 2006

authorising the Kingdom of the Netherlands to apply a 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

(Only the Dutch text is authentic)

(2006/181/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 with the Secretariat-General of the Commission on 4 October 2004, the Kingdom of the Netherlands sought authorisation to introduce a special measure derogating from Article 11(A)(1)(a) of Directive 77/388/EEC.

(2) In accordance with Article 27(2) of Directive 77/388/EEC, the Commission informed the other Member States by letter dated 1 December 2004 of the request made by the Kingdom of the Netherlands. By letter dated 2 December 2004, the Commission notified the Kingdom of the Netherlands that it had all the information it considered necessary for appraisal of the request.

(3) The aim of the derogation is to prevent the avoidance of value added tax (VAT) through the undervaluation of supplies between connected persons, where the recipient is not entitled to full or almost full deduction of VAT. It is designed to circumvent abuses in the supply of capital items or in the supply of services in relation to capital items, such as leasing or letting or any other arrangement whereby the goods are put at the disposal of the recipient. Because of the relationship between the parties, the consideration is often fixed at a non-market value, resulting in significantly lower VAT revenues.

(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) of Directive 77/388/EEC, has been influenced by the relationship between the parties. That conclusion should, in each case, be based on manifest facts, not presumptions.

(5) It is therefore appropriate and proportionate to permit the Kingdom of the Netherlands to treat the open-market value of those supplies as the taxable amount.

(6) The derogations pursuant to Article 27 of Directive 77/388/EEC which counter avoidance of VAT linked to the taxable amount of supplies between related parties are included in a proposal for a Directive rationalising some of the derogations pursuant to that Article. It is therefore necessary to cause the application period of this derogation to end when that Directive enters into force.

(7) 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 Kingdom of the Netherlands is hereby authorised to take the open-market value, as defined in Article 11(A)(1)(d) of Directive 77/388/EEC, as the taxable amount for the supply of capital items or any other supply of services whereby the capital item is put at the disposal of the recipient, where the following conditions are met:

[1] OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2005/92/EC (OJ L 345, 28.12.2005, p. 19).

1. the recipient does not have the right to full or almost full deduction of VAT;

2. the supplier and the recipient are directly or indirectly connected persons according to national legislation;

3. facts make it possible to conclude from the circumstances of the case that the relationship between those connected persons has influenced the taxable amount, as determined in accordance with Article 11(A)(1)(a) of Directive 77/388/EEC.

For the purposes of this Article, capital item shall mean capital goods as defined by the Kingdom of the Netherlands in accordance with Article 20(4) of Directive 77/388/EEC and, as far as they are not covered by this definition, services of substantial value which can be amortised.

Article 2

The authorisation granted under Article 1 shall expire on the date of entry into force of a Directive rationalising the derogations pursuant to Article 27 of Directive 77/388/EEC which counter avoidance of VAT linked to the taxable amount, or on 31 December 2009, whichever is the earlier.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 27 February 2006.

For the Council

The President

U. PLASSNIK