

61986J0138

Judgment of the Court of 12 July 1988. - Direct Cosmetics Ltd and Laughtons Photographs Ltd v Commissioners of Customs and Excise. - References for a preliminary ruling: Value Added Tax Tribunal, London - United Kingdom. - Sixth Directive on value-added tax - Authorization of derogating measures - Validity. - Joined cases 138/86 and 139/86.

European Court reports 1988 Page 03937

Swedish special edition Page 00535

Finnish special edition Page 00545

Summary

Parties

Grounds

Decision on costs

Operative part

Keywords

++++

Tax provisions - Harmonization of legislation - Turnover taxes - Common system of value-added tax - Taxable base - National derogating measures - Policy of combating tax evasion or avoidance - Measure applicable to a taxable person acting without any intention of obtaining a tax advantage - Measure designed to combat tax avoidance - Measure applicable only to certain taxable persons whose sales methods lead to the avoidance of tax - Whether permissible - Conditions

(Council Directive 77/388/EEC, Arts 11A.1 (a) and 27 (1))

Summary

Article 27 (1) of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes empowers the Council to authorize the Member States to introduce special measures derogating from the directive in order to prevent certain types of tax evasion or avoidance . That provision permits the adoption of a measure derogating from the rule set out in Article 11.A.1 (a), concerning the taxable base for value-added tax purposes, even where the taxable person carries on business of a kind capable of leading to a reduction of that base, not with any intention of obtaining a tax advantage but for commercial reasons . Such conduct comes within the concept of avoidance which, unlike that of evasion which involves an element of intent, represents a purely objective phenomenon .

The adoption of a derogating measure which applies only to certain taxable persons amongst those whose sales methods lead to the avoidance of tax is permissible on condition that the resultant difference in treatment is justified by objective circumstances .

Parties

In Joined Cases 138 and 139/86

REFERENCES to the Court under Article 177 of the EEC Treaty by the London Value-added Tax Tribunal for a preliminary ruling in the proceedings pending before that Tribunal between

Direct Cosmetics Limited and

Laughtons Photographs Limited,

and

Commissioners of Customs and Excise,

on the interpretation of Article 27 of 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 (Official Journal 1977 L 145, p . 1) and on the validity of Council Decision No 85/369/EEC of 13 June 1985 (Official Journal 1985 L 199, p . 60) which authorized the United Kingdom, under Article 27

of the Sixth Directive, to introduce for a period of two years a measure derogating from that directive in order to prevent certain types of tax avoidance,

THE COURT

composed of : G . Bosco, President of Chamber, acting as President, O . Due and G . C . Rodríguez Iglesias, Presidents of Chambers, T . Koopmans, U . Everling, K . Bahlmann, Y . Galmot, C . Kakouris, R . Joliet, T . F . O' Higgins and F . Schockweiler, Judges,

Advocate General : J . L . Da Cruz Vilaça

Registrar : H . A . Ruehl, Principal Administrator

after considering the observations submitted on behalf of :

Direct Cosmetics Limited and Laughtons Photographs Limited, the appellants in the main proceedings, by Sleight and Son, Solicitors, and D . Vaughan QC,

*the Government of the Federal Republic of Germany, by M . Seidel, acting as Agent,
the United Kingdom, by H . R . Purse, acting as Agent,
the Commission of the European Communities, by J . Fons Buhl, acting as Agent,
the Council of the European Communities, by R . Fornasier and J . Huber, acting as Agents,
having regard to the Report for the Hearing and further to the hearing on 14 October 1987,
after hearing the Opinion of the Advocate General delivered at the sitting on 27 January 1988,
gives the following*

Judgment

Grounds

1 By two decisions of 15 May 1986, which were received at the Court on 5 June 1986, the London Value-added Tax Tribunal referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions on the interpretation of Articles 11 and 27 of 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 (hereinafter referred to as "the Sixth Directive ") and on the validity of Council Decision No 85/369/EEC of 13 June 1985, which was adopted pursuant to Article 27 of the aforesaid directive and authorized the introduction of a measure derogating from the Sixth Directive that was requested by the United Kingdom in order to prevent certain types of tax avoidance .

2 Those questions arose in a dispute between Direct Cosmetics Limited and Laughtons Photographs Limited, the appellants in the main proceedings, on the one hand, and the Commissioners of Customs and Excise, on the other, concerning the determination of the taxable base for charging value-added tax in respect of certain activities of the appellant companies .

3 It is apparent from the documents before the Court that Direct Cosmetics Limited is a company specializing in "direct sales" of cosmetic products which, in what are called "special" situations, cannot be sold on the ordinary retail market . The cosmetics consist of surplus stocks, discontinued lines and products which were wrapped or packaged for a particular occasion, such as Christmas, but which could not be sold on the occasion envisaged . Direct Cosmetics Limited buys those products at low prices and resells them through agents in hospitals, factories and offices on the following conditions : the product is sold at the company' s catalogue price; if the selling agent pays the sale price to the company within 14 days, he may retain a 20% discount, otherwise he must pay the full price . The turnover of all of the company' s agents is below the minimum laid down by United Kingdom legislation in accordance with Article 24 of the Sixth Directive above which a person is liable to value-added tax .

4 Laughtons Photographs Limited is a company which specializes in taking photographs of classes and individual children at school . At the beginning of each year, its representatives visit the schools in order to solicit orders for photographs . During the year bookings are made and one of the company' s photographers - it employs eight in all - goes to the school in order to take individual and class photographs . The company sells the photographs to the schools, which then sell them to parents . The sales method at present employed by Laughtons Photographs Limited seems to consist in invoicing the schools for the packages of photographs at an agreed price . In most cases the company is then unaware of the price at which the photographs are sold to parents

. No value-added tax is charged on the turnover generated by the schools .

5 As a result of those two sales schemes, the final taxable base for the purposes of value-added tax is not the final value of the sale to consumers . Consequently no tax is paid on the difference between the final price and the price previously charged .

6 In order to deal with that form of tax avoidance, a measure derogating from Article 11.A.1 (a) of the Sixth Directive was provided for in paragraph 3 of Schedule 3 to the Finance Act 1977, the statute by which the United Kingdom gave effect to the Sixth Directive . That measure was notified to the Commission .

7 The United Kingdom subsequently amended that provision by section 14 (1) of the Finance Act 1981, without notifying the amendment to the Commission .

8 In reply to one of the questions submitted to the Court for a preliminary ruling in Case 5/84 (*Direct Cosmetics v Commissioners of Customs and Excise* ((1985)) ECR 617), the Court held in its judgment of 13 February 1985 that the aforesaid amendment should have been notified to the Commission under Article 27 (1) of the Sixth Directive .

9 In order to comply with that judgment, the United Kingdom notified the Commission on 15 March 1985 of the aforesaid provision, as amended, which at present constitutes paragraph 3 of Schedule 4 to the Value-added Tax Act 1983, and, in accordance with Article 27 of the Sixth Directive, it requested the Council's authorization to introduce that provision .

10 Paragraph 3 of Schedule 4 to the Value-added Tax Act 1983 is worded as follows :

"Where -

(a) the whole or part of a business carried on by a taxable person consists in supplying to a number of persons goods to be sold whether by them or others, by retail, and

(b) those persons are not taxable persons, the Commissioners made by notice in writing to the taxable person direct that the value of any such supply by him after the giving of the notice or after such later date as may be specified in the notice shall be taken to be its open-market value on a sale by retail ."

11 Paragraph 3 of Schedule 3 was authorized by Council Decision No 85/369/EEC of 13 June 1985, which was adopted in accordance with the tacit approval procedure provided for in Article 27 (4) of the Sixth Directive .

12 On the basis of that paragraph, and following the grant of authorization to the United Kingdom, the Commissioners of Customs and Excise made a direction on Laughtons Photographs Limited in the following terms :

"In pursuance of paragraph 3 of Schedule 4 to the Value-added Tax Act 1983, the Commissioners of Customs and Excise hereby direct that after 30 June 1985, the value by reference to which value-added tax is charged on any taxable supply of goods :

(a) by you to persons who are not taxable persons within the meaning of section 2 of the Value-added Tax Act 1983,

(b) to be sold, whether by persons mentioned in (a) above or others, by retail,

shall be taken to be its open-market value on a sale by retail ."

13 On 5 July 1985 a direction worded in identical terms was made on Direct Cosmetics Limited .

14 Laughtons Photographs Limited and Direct Cosmetics Limited appealed against those directions to the London Value-added Tax Tribunal . They maintained that the directions were invalid, inasmuch as they were outside the limits of the aims referred to in Article 27 (1) of the Sixth Directive, as was the Council' s authorizing decision of 13 June 1985 . Accordingly, as the derogation was invalid in their view, the appellant companies considered that, pursuant to the general rule in Article 11.A.1 (a) of the Sixth Directive, which they maintained had direct effect in English law, they were accountable for value-added tax only on the value of the consideration actually received by them .

15 For their part, the Commissioners contended that the Council' s authorization constituted a valid derogation and that they had correctly adopted the special measure in question . They argued that where a method of trading was employed by means of which non-taxable persons were interposed between a company and its consumers, it was their duty to ensure that tax was recoverable at the full value of the product at the retail stage .

16 The London Value-added Tax Tribunal stayed the proceedings and referred to the Court of Justice for a preliminary ruling the following questions, which are the same in both cases :

"1 . Is a measure, such as that contained in paragraph 3, Schedule 4 of the Value-added Tax 1983, within the limits allowed by Article 27 (1) of the Sixth Directive, or is it wider than is strictly necessary?

2 . Is such a measure which is applied to

(i) a taxpayer who has been accepted as carrying on business without any intention to evade or to avoid value-added tax and whose method of trading has evolved solely on account of commercial considerations

(ii) a taxpayer who has been accepted as carrying on business without any intention to evade or to avoid value-added tax and whose method of trading has evolved solely on account of commercial considerations but which may have the objective result that some tax has been avoided

(iii) to some taxpayers but not against other such taxpayers who are selling directly to unregistered resellers

within the limits of the derogation allowed by Article 27 (1) of the Sixth Directive or is it wider than is strictly necessary?

3 . Can such a measure be applied to taxpayers whose activities fall outside the matters referred to in Article 27 of the said Sixth Directive or outside the terms of the request for authorization or the terms of the actual authorization by the Council of Ministers?

4 . Is the decision of authorization of the Council of Ministers invalid or of no effect for any substantive or procedural reason, such as the failure of the Council of Ministers or the Member States to evaluate or to be informed of the fact that the measure was not capable of being evaluated either against the criteria laid down in Article 27 of the Sixth Directive or against the principle of proportionality or against the basic principles of the Sixth Directive?

5 . Does the decision of authorization of the Council of Ministers mean that an individual taxpayer, such as the appellant, who has been accepted as carrying on business without any intention to evade or to avoid value-added tax, cannot rely upon being taxed under the provisions laid down in Article 11.A.1 (a) of the Sixth Directive on value-added tax?"

17 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the legal background thereto, and also the course of the proceedings and the observations submitted to the Court, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court .

18 In its aforesaid questions the London Value-added Tax Tribunal seeks in substance to ascertain :

(a) whether Article 27 (1) of the Sixth Directive permits the adoption of a derogating measure, such as that at issue, where the taxpayer carries on business in a certain manner not with any intention of obtaining a tax advantage but for commercial reasons;

(b) whether Article 27 (1) permits the adoption of a measure such as that at issue which is not applicable to all, but only to some, taxable persons who sell to non-taxable resellers;

(c) whether the Council' s authorizing decision is invalid on account of a procedural defect;

(d) whether the Council' s authorizing decision is invalid on substantive grounds and, in particular, whether the authorized measure is disproportionate to the objective referred to in Article 27 (1), namely the prevention of certain types of tax evasion or avoidance .

19 The questions raised may therefore be grouped together in the manner indicated above for the purposes of the answer to be given by the Court .

Question (a)

20 The concept of tax avoidance as expressed in Article 27 (1) of the Sixth Directive is a concept of Community law . Hence the definition of that concept is not left to the discretion of the Member States .

21 The wording of Article 27, in all the language versions, draws a distinction between the concept of avoidance, which represents a purely objective phenomenon, and that of evasion, which involves an element of intent .

22 That distinction is confirmed by the historical background to Article 27 . Whilst the Second Council Directive on value-added tax (67/228/EEC) of 11 April 1967 (Official Journal, English Special Edition 1967, p . 16) referred exclusively to the concept of "fraud", the Sixth Directive mentions in addition the concept of tax avoidance . This means that the legislature intended to introduce a new element in relation to the pre-existing concept of tax evasion . That element lies in the inherently objective nature of tax avoidance; intention on the part of the taxpayer, which constitutes an essential element of evasion, is not required as a condition for the existence of avoidance .

23 That interpretation is in conformity with the principle governing the system of value-added tax according to which the factors which may lead to distortions of competition at national and Community level are to be eliminated and a tax which is as neutral as possible and covers all the stages of production and distribution is to be imposed . The title of the Sixth Directive, refers to a "uniform basis of assessment" of value-added tax . Furthermore, the second recital in the preamble to the directive refers to "a basis of assessment determined in a uniform manner according to Community rules" and the ninth recital specifies that "the taxable base must be

harmonized so that the application of the Community rate ... leads to comparable results in all the Member States ". It follows that the system of value-added tax is concerned principally with objective effects, whatever the intentions of the taxable person may be .

24 The answer to the first question must therefore be that Article 27 (1) of the Sixth Directive permits the adoption of a measure derogating from the basic rule set out in Article 11.A.1 (a) of that directive even where the taxable person carries on business, not with any intention of obtaining a tax advantage but for commercial reasons .

Question (b)

25 With regard to this question, it should be noted that the undertakings which have recourse to methods of trading such as those of Direct Cosmetics Limited and Laughtons Photographs Limited are not all of the same size in the commercial sector and, in particular, are not all equally significant from the point of view of the effects of their methods on the functioning of the system of value-added tax .

26 Thus, if the business of an undertaking consists primarily or to a large extent in selling to non-taxable resellers, failure to apply the derogating measures adopted in order to prevent certain types of tax avoidance would lead to the substantial and continuing losses of tax revenue and to a distortion of competition . However, the position would be different in the case of an undertaking which is a taxable person and which sells goods only occasionally and to a limited extent to non-taxable resellers .

27 In order to deal with differing economic situations, Article 27 (1) leaves to the Member States a discretion to adapt measures derogating from the Sixth Directive to the specific purpose for which they are adopted . To that end, different treatment may be allowed in so far as it is justified by objective circumstances .

28 The answer to the second question must therefore be that Article 27 (1) of the Sixth Directive permits the adoption of a derogating measure, such as that at issue in the main proceedings, which applies only to certain taxable persons amongst those selling goods to non-taxable resellers, on condition that the resultant difference in treatment is justified by objective circumstances .

Question (c)

29 As regards the question whether the authorizing decision is valid in the light of the procedure laid down in Article 27 of the Sixth Directive, the appellants in the main proceedings rely on a number of submissions . In the first place, they argue that the authorization in question was requested in order to prevent tax evasion, not tax avoidance . They point out that, in the notification sent by the United Kingdom to the Commission on 15 March 1985 in accordance with Article 27 (2), reference is made not to tax avoidance but to tax evasion . They add that the English version of the Official Journal of the European Communities of 31 July 1985, in which the Council' s tacit decision authorizing the derogating measure requested by the United Kingdom was published, refers expressly to tax evasion .

30 It must be pointed out that it emerges from the terms of the aforesaid notification, which was sent on 15 March 1985 by the United Kingdom to the Commission, that the measure requested by the United Kingdom was intended to deal with the fact that certain sums of money were not chargeable to value-added tax as a result of the sales methods which were employed by some undertakings and the effect of which was that value-added tax corresponding to the added value paid by the final consumer was not collected by the tax authorities . That notification contains the following sentence : "While these companies and dealers do not seek to evade payment of tax, the effect of their marketing structure is that tax on the value added by the dealer to the final consumer

is avoided ". Therefore it was clear that, irrespective of the terminology used in the notification, the cases referred to were ones of tax avoidance and not tax evasion .

31 The French version and most of the other language versions of the aforesaid Official Journal in which the Council' s tacit decision was published refer to tax avoidance . Although it is true that in the English language version of the same Official Journal reference is made to tax evasion, that error, which is also to be found in the Greek and Dutch versions of the Official Journal in question, is not such as to affect the meaning and the spirit of the decision as a whole . Moreover, that error was rectified by the corrigendum published by the Council in the English version of Official Journal L 93 of 7 April 1987 .

32 Having regard to the foregoing considerations, the error in question cannot therefore have the effect of rendering the authorization itself null and void .

33 In its question, the national court also casts doubt on the validity of the authorization at issue on the ground that the Council or the Member States had been unable to evaluate the measure requested by the United Kingdom in the light of the criteria laid down in Article 27, the principle of proportionality and the basic principles of the Sixth Directive and on the ground that they had not been informed that the measure in question was capable of being the subject of such an evaluation .

34 In that regard, the appellants in the main proceedings argue that the authorization cannot be deemed to have been lawfully granted in accordance with the tacit approval procedure since it was impossible for the essential elements of the problem to be assessed as required . In any event, they maintain, the tacit approval procedure itself was not complied with since the Commission, in a document dated 12 April 1985 which it sent to the other Member States in accordance with Article 27 (3), failed to draw their attention, in response to a request to that effect made by Direct Cosmetics Limited in its letter to the Commission of 12 March 1985, to the problems raised by the measure which had been requested .

35 In that regard, it must be pointed out that the aforesaid provision, which lays down the procedure for the tacit approval of a derogating measure requested by a Member State, does not provide for any exception in circumstances such as those in the cases in point . Moreover, the Commission was under no obligation, on the basis of the provisions in force, to draw the attention of the Member States to any problems that raised by those cases and, in any event, it was not placed under an obligation to do so by the fact that one of the undertakings concerned had made a request to that effect .

36 Furthermore, the aforementioned notification made by the United Kingdom to the Commission referred in sufficient detail to the needs which the measure in question was intended to meet and it contained all the essential elements to enable the aim pursued to be identified . Accordingly, it was for each Member State to assess the significance of any problems raised by the cases in point and to appraise the legality and expediency of the derogating measure requested by the United Kingdom .

37 It must therefore be held that consideration of the question raised has disclosed no procedural defects of such a kind as to affect the validity of the Council' s tacit decision authorizing the derogating measure requested by the United Kingdom .

Question (d)

38 The appellants in the main proceedings maintain in the first place that the authorization granted to the United Kingdom is invalid inasmuch as the choice of the derogation from the fundamental principles of the Sixth Directive, made on the basis of Article 27 (1) in order to deal with types of tax avoidance, is disproportionate to the aim pursued .

39 According to the appellants in the main proceedings, that aim could be achieved either through the application of Article 4 (4) of the Sixth Directive, which confers on each Member State the option of treating as a single taxable person any persons established within its territory who, while legally independent, are closely bound to one another by financial, economic and organizational links, or through the application of Article 24 of the Sixth Directive, which confers on the Member States the option of applying to small undertakings simplified procedures for charging and collecting the tax .

40 However, that argument disregards the fact that whereas Article 4 (4) applies to a situation in which a "close link" exists between different persons engaged in taxable transactions, it is precisely a close link of that kind which is lacking in the cases in point in these proceedings .

41 As for Article 24, it confers on the Member States a broad power to assess whether, and in what conditions, it is necessary to introduce flat-rate schemes, or other simplified procedures for charging and collecting the tax, in the case of small undertakings . Accordingly, the fact that a Member State has not, for reasons of its own, exercised that option cannot be regarded as an obstacle which precludes recourse to the possibility of applying for authorization to introduce measures derogating from the Sixth Directive in accordance with Article 27 thereof .

42 The appellants in the main proceedings go on to argue, in support of their contention that the Council' s tacit decision is invalid, that the authorization granted to the United Kingdom is very wide and amounts in fact to conferring on the Commissioners of Customs and Excise a new discretion that is unlimited, excessive and unnecessary .

43 More particularly, according to the declaration made by the United Kingdom in the aforesaid notification of 15 March 1985 to the Commission, the measure requested by the United Kingdom was intended to apply only to undertakings "in a substantial way of business " . According to the appellants in the main proceedings, that is a vague expression which confers excessive powers on the Commissioners of Customs and Excise .

44 That argument cannot be upheld . The aforesaid notification contains sufficient details regarding the definition of the scope of the derogating measure sought by the United Kingdom, whilst conferring on the competent authorities the necessary freedom of action to make use of that measure in cases in which its application is considered appropriate .

45 Thirdly, the appellants in the main proceedings put forward the argument that the measure in question discriminates against them in favour of small undertakings within the meaning of Article 24 of the Sixth Directive, which benefit from the application of the derogating measure in question since they are exempt from the tax whilst collecting it from the final consumer .

46 That argument cannot be upheld . Article 24, which concerns the special scheme for charging the tax on small undertakings, pursues a purpose which is quite different and which precludes any comparison with the situation in the present cases .

47 The appellants in the main proceedings go on to maintain that the derogating measure in question imposes taxation on monies never received by the taxable person . In their view, that effect, which is produced by the measure under consideration, distorts competition, falls outside the limits of the objectives of Article 27 and, in any event, renders the measure disproportionate to the aim pursued .

48 In that regard, it must be pointed out that the objective of the measure under consideration is to prevent a systematic loss of tax revenue, resulting from a specific sales method applied consistently by undertakings of a certain size . In the light of that objective it cannot therefore be claimed that the measure is disproportionate to the aim pursued .

49 With regard to the argument alleging that the measure in question has the effect of distorting competition, it must be pointed out that it is precisely the absence of such a measure that would perpetuate a distortion of competition to the detriment of undertakings whose sales schemes are structured differently . That argument cannot therefore be upheld .

50 Finally, the appellants in the main proceedings maintain that the authorization granted to the United Kingdom does not provide a clear definition of what the taxable base is under the system established by the derogating measure . In their view, the concept of open-market value, which has been adopted as the taxable base under that system, is so vague as to be incapable of constituting a precise base and is therefore capable of being applied in an arbitrary manner .

51 It should be pointed out in that respect that the concept of open-market value, which has been adopted as the taxable base under the system established by the derogating measure authorized by the Council, must be interpreted in the context of the provisions of Article 27 of the Sixth Directive, on the basis of which that measure was authorized .

52 In that regard, it is of decisive significance that Article 27 states, at the end of paragraph (1), that "measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage ". That statement, which is in conformity with the fundamental principle of the Sixth Directive as described in connection with the first question, is also valid as regards measures which are intended to prevent certain types of tax evasion or avoidance and which, as the Court has emphasized, may not derogate from the basis for charging value-added tax set out in Article 11 except to the extent strictly necessary for preventing such evasion or avoidance (judgment of 10 April 1984 in Case 324/82 Commission v Kingdom of Belgium ((1984)) ECR 1861, and judgment of 13 February 1985 in Case 5/84, cited above).

53 Having regard to the foregoing considerations, the open-market value for the purposes of the system established by the derogating measure in question must be understood as meaning the value that is closest to the commercial value on a sale by retail, that is to say the actual price paid by the final consumer . That interpretation finds support by Article 11.A.1 (d) of the Sixth Directive, which refers to the open-market value of the services supplied, and by Article 11.B.1 (b), which refers to the open-market value, in connection with the importation of goods, where no price is paid or where the price paid or to be paid is not the sole consideration for the imported goods . Accordingly, the concept of open-market value is neither vague nor imprecise .

54 It must therefore be held that consideration of the question raised has disclosed no factors concerning the terms of the authorization of such a kind as to affect the validity of the Council' s tacit decision authorizing the derogating measure requested by the United Kingdom .

Decision on costs

Costs

55 The costs incurred by the United Kingdom, the Government of the Federal Republic of Germany, the Council of the European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable . As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court .

Operative part

On those grounds,

THE COURT

in answer to the questions referred to it by the London Value-added Tax Tribunal, by decisions of 15 May 1986, hereby rules :

(1) Article 27 (1) of the Sixth Directive permits the adoption of a measure derogating from the basic rule set out in Article 11.A.1 (a) of that directive even where the taxable person carries on business, not with any intention of obtaining a tax advantage but for commercial reasons .

(2) Article 27 (1) of the Sixth Directive permits the adoption of a derogating measure, such as that at issue in the main proceedings, which applies only to certain taxable persons amongst those selling goods to non-taxable resellers, on condition that the resultant difference in treatment is justified by objective circumstances .

(3) Consideration of the question raised has disclosed no factors of such a kind as to affect the validity of Council Decision No 85/369 of 13 June 1985 authorizing a derogating measure requested by the United Kingdom .