# 61988J0165

Judgment of the Court of 5 December 1989. - ORO Amsterdam Beheer BV and Concerto BV v Inspecteur der Omzetbelasting Amsterdam. - Reference for a preliminary ruling: Gerechtshof Amsterdam - Netherlands. - VAT - Resale of second-hand goods. - Case C-165/88.

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## Keywords

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*1.Member States - Obligations - Obligation to act in the place of the Council whenever it fails to act - None*

*( EEC Treaty, Art . 5 )*

*2.Tax provisions - Harmonization of laws - Turnover taxes - Common system of value-added tax - Sale by taxable persons of second-hand goods purchased from non-taxable persons - National rules which do not allow account to be taken of the residual tax contained in the purchase price - Not incompatible with the Community rules as they now stand*

*( Council Directive 77/388/EEC, Art . 32 )*

## Summary

*1.Although it is true that if the Council fails to adopt measures falling within the exclusive competence of the European Communities, there can be no fundamental objection in certain cases to Member States' maintaining or introducing, pursuant to the duty to cooperate imposed on them by Article 5 of the Treaty, national measures designed to achieve Community objectives, no general principle can be inferred from that fact requiring the Member States to act in the place of the Council whenever it fails to adopt measures falling within its province .*

*2.Community law and the Community rules governing VAT do not, as they now stand, preclude national legislation which, for the purpose of calculating the VAT payable on the turnover arising from the sale of second-hand goods, does not allow account to be taken of the tax still contained in the price of goods which have been purchased from non-taxable individuals with a view to their resale .*

*Until the Community legislature has taken action and in so far as nowhere in the common system of value-added tax, as it stands at present, are to be found the necessary bases for determining and laying down detailed rules for applying a common system of taxation enabling double taxation to be avoided in trade in second-hand goods, it is necessary to continue to apply Article 32 of the Sixth Directive, which merely authorizes Member States that apply a special system of VAT to second-hand goods to retain that system but does not impose on them any obligation to introduce such a system if none exists .*

# Parties

*In Case C-165/88*

*REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof ( Regional Court of Appeal ), Amsterdam, for a preliminary ruling in the proceedings pending before that court between*

*ORO Amsterdam Beheer BV and Concerto BV*

*and*

*Inspecteur der Omzetbelasting, Amsterdam,*

*on the compatibility with Community law, in particular Article 32 of the Sixth Council Directive on Value-Added Tax ( 77/388/EEC ) of 17 May 1977, of national legislation under which turnover tax is charged at the full rate on the supply of second-hand goods, without taking into account the fact that the goods were purchased from individuals and consequently are already burdened with residual tax,*

*THE COURT*

*composed of : O . Due, President, C . N . Kakouris, President of Chamber, T . Koopmans, R . Joliet, J . C . Moitinho de Almeida, G . C . Rodríguez Iglesias and F . Grévisse, Judges,*

*Advocate General : G . Tesauro*

*Registrar : J . A . Pompe, Deputy Registrar*

*after considering the observations submitted on behalf of*

*the Commission of the European Communities, by J . F . Buhl, Legal Adviser, and B . J . Drijber, a member of its Legal Department, acting as Agents,*

*the Government of the Netherlands, by E . F . Jacobs and M . A . Fierstra, acting as Agents,*

*ORO Amsterdam Beheer BV and Concerto BV, by W . Molenaar and G . Molenaar, acting as*

*Director and Agent respectively,*

*having regard to the Report for the Hearing and further to the hearing on 12 July 1989,*

*after hearing the Opinion of the Advocate General delivered at the sitting on 24 October 1989,*

*gives the following*

*Judgment*

# Grounds

*1 By order of 24 May 1988, which was received at the Court on 13 June 1988, the Gerechtshof ( Regional Court of Appeal ), Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the provisions of the Treaty and of the Sixth Council Directive of 17 May 1977 ( 77/388/EEC ) 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, hereinafter referred to as "the Sixth Directive ") in order to enable it to assess the compatibility with Community law of Netherlands tax legislation in so far as the latter does not provide special rules for the application of the system of VAT to trade in second-hand goods which have been purchased from individuals with a view to their resale .*

*2 The questions were raised in the course of proceedings between two companies, ORO Amsterdam Beheer BV and Concerto BV, and the Netherlands tax authorities concerning the VAT payable on transactions carried out in December 1986 .*

*3 It appears from the documents before the Court that in December 1986 the plaintiffs in the main proceedings, which run a business retailing new and second-hand gramophone records, music cassettes and compact discs, made sales totalling HFL 256 698 net of tax, of which HFL 250 915 was subject to VAT at the rate of 20 %. After deducting the input tax, the plaintiff companies paid the tax authorities VAT amounting to HFL 37 608 .*

*4 On 5 March 1987, however, the companies lodged an appeal with the Gerechtshof, Amsterdam, seeking the reimbursement of HFL 6 251 of the tax paid, on the ground that they should be allowed to deduct from the tax payable in respect of sales for December 1986 the amount of VAT that was still contained in the price of second-hand articles purchased by them from individuals . Calculating this amount at a flat rate of 20/120ths of the total sum of their purchases of second-hand goods in December 1986, which was HFL 37 509, the undertakings claimed reimbursement of HFL 6 251 .*

*5 The Gerechtshof, Amsterdam, found that no provision of Netherlands tax legislation allowed the deduction of input tax paid on second-hand goods purchased by a taxable person from a non-taxable person . It noted that it was clear from the VAT directives and the judgments of the Court that one of the fundamental characteristics of the VAT system was that at each marketing stage the input tax paid on goods was deductible from the tax payable and it therefore stayed the proceedings and referred to the Court the following two questions :*

*"( 1 ) Is it in conformity with Community law, and in particular with the provisions of the Treaty establishing the European Economic Community and of the Sixth Council Directive 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 ( 77/388/EEC ), for a Member State to*

*have charged, in December 1986, turnover tax at the full rate on the supply of second-hand goods without taking any account whatsoever of the fact that those goods were bought from individuals, in view of the fact that in the Sixth Directive the Council of the European Communities committed itself to, and gave notice of, the adoption before 31 December 1977 of a Community taxation system applicable to trade in second-hand goods but has so far taken no action in that regard?*

*( 2 ) If the first question is answered in the negative, how is account to be taken, in the determination of the turnover tax payable on the supply of second-hand goods, of the fact that the goods were bought from individuals?"*

*6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant Community rules, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .*

*7 By its first question, the Gerechtshof, Amsterdam, seeks to ascertain essentially whether Community law and, in particular, the Sixth Directive preclude national tax legislation which, for the purpose of calculating the VAT payable on the turnover arising from the sale of second-hand goods, does not allow account to be taken of the tax still contained in the price of goods which have been purchased from non-taxable individuals with a view to their resale .*

*8 As it stands at present, Community law has no special VAT rules for second-hand goods . In its Proposal for a sixth directive, submitted to the Council on 29 June 1973 ( Official Journal 1973, C 80, p . 1 ), the Commission had provided, in Article 26, for a "special scheme for second-hand goods", which were defined in paragraph ( 1 ) as follows : "' Second-hand goods' means used moveable property which can be reused as it is or after repair, excluding original works of art created by the hand of the artist, antiques, collectors' items, and stamps and coins being collectors' items ."*

*9 This "special scheme" provided that, where second-hand goods were acquired from a non-taxable person by a taxable person with a view to their resale, the latter could take account of the VAT borne by the goods in question and laid down detailed rules for the calculation of the deduction to which the taxable person acquiring the goods was thus entitled .*

*10 Since no decision could be reached on the basis of the Commission' s proposals, the Council adopted a transitional measure in the form of Article 32 of the Sixth Directive, which provides as follows :*

*"The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977 a Community taxation system to be applied to used goods, works of art, antiques and collectors' items . Until this Community system becomes applicable, Member States applying a special system to these items at the time this directive comes into force may retain that system ."*

*11 On 11 January 1978, the Commission submitted to the Council, pursuant to the first paragraph of that provision, a Proposal for a seventh directive laying down the "common system of value-added tax to be applied to works of art, collectors' items, antiques and used goods" ( Official Journal 1978, C 26, p . 2 ), which was subsequently amended ( amendments submitted to the Council on 16 May 1979, Official Journal 1979, C 136, p . 8 ). Since the Council was unable to reach a decision, this proposal was withdrawn by the Commission in November 1987 . A fresh proposal was submitted to the Council on 11 January 1989 ( Official Journal 1989, C 76, p . 10 ) but has not yet been adopted .*

*12 The plaintiffs in the main proceedings and the Commission contend first of all that it is clear*

*from the judgments of the Court ( judgments of 5 May 1982 in Case 15/81 Gaston Schul Douane-Expediteur BV v Inspecteur der Invoerrechten en Accijnzen (( 1982 )) ECR 1409, and of 21 May 1985 in Case 47/84 Staatssecretaris van Financiën v Gaston Schul Douane-Expediteur BV (( 1985 )) ECR 1491 ) that there is a general principle prohibiting double taxation, so that national measures designed to avoid it, in particular in the case of second-hand goods, are valid ( judgments of 10 July 1985 in Case 16/84 Commission v The Netherlands (( 1985 )) ECR 2355, and in Case 17/84 Commission v Ireland (( 1985 )) ECR 2375 ).*

*13 The second contention is that if the Council fails to act the Member States are entitled, in accordance with the judgments of 5 May 1981 in Case 804/79 Commission v United Kingdom (( 1981 )) ECR 1045 and of 28 March 1984 in Joined Cases 47 and 48/83 Pluimveeslachterij Midden-Nederland BV and Van Miert (( 1984 )) ECR 1721, to maintain or adopt measures designed to achieve the Community objectives . Although the Council has exclusive power to adopt tax harmonization measures, the Member States themselves are, in their view, obliged, in view of the Council' s failure, to take action with regard to the rules on the taxation of second-hand goods in order to ensure that the fundamental principle prohibiting double taxation is observed . That obligation to act is made necessary by the development of Community law in the field of VAT .*

*14 The Netherlands Government, however, observes that Article 32 of the Sixth Directive contains a "standstill" clause which prohibits the Member States from amending or extending the existing special provisions for second-hand goods, in order to prevent additional disparities in national legislation . There is nothing in Article 32 to suggest that the Member States are obliged to act in order to introduce a special scheme for second-hand goods .*

*15 Before replying to the question whether the Member States are entitled or obliged to act as a result of the Council' s failure to lay down a Community system of taxation to be applied to used goods, as provided for in the first paragraph of Article 32 of the Sixth Directive, it is necessary to point out that the Court has held that if the Council fails to adopt measures falling within the exclusive competence of the European Communities, there can be no fundamental objection in certain cases to Member States' maintaining or introducing, pursuant to the duty to cooperate imposed on them by Article 5 of the Treaty, national measures designed to achieve Community objectives . However, no general principle requiring the Member States to act in the place of the Council whenever it fails to adopt measures falling within its province can be inferred from those judgments .*

*16 The essential point, however, is that under the system to which the national court refers, if an individual sells goods to a taxable trader, no VAT is charged on that supply, but upon their resale by the taxable person an amount of VAT proportionate to the resale price is payable and the taxable person may not deduct the VAT already borne by the goods .*

*17 The question is thus whether the fact that national legislation does not provide for a special scheme of VAT for second-hand goods whereby such double taxation may be avoided is contrary to the Treaty and to the Sixth Directive . The question also arises where national legislation contains provisions which, because they relate to special arrangements for taxing certain transactions in second-hand goods, are fragmentary and cannot be regarded as a complete system of VAT rules applicable to used goods . A comprehensive and positive reply to that question cannot be given on the basis of the judgments of the Court alone .*

*18 First of all, it should be noted that, although in its judgments of 5 May 1982 and 21 May 1985 in the two Gaston Schul cases, cited above, to which reference is made by the plaintiffs in the main proceedings and by the Commission, the Court held that the imposition of VAT on the importation of goods supplied by a private person from another Member State, where no VAT was levied on a transaction of the same type within the territory of the State of importation, was incompatible with*

*Community law, that ruling was not based on a general principle prohibiting tax cumulation but on Article 95 of the Treaty, which prohibits internal taxation which discriminates against imported goods .*

*19 For the purposes of the application of Article 6(2)(a ) of the Sixth Directive, which provides that the private use by the taxable person or by his staff of goods forming part of the assets of his business, where the VAT on such goods is deductible, is to be taxed as a supply of services, the Court has indeed ruled that such a charge to tax was precluded in the case of goods which were purchased second hand and which did not therefore give rise to a right of deduction ( judgment of 27 June 1989 in Case 50/88 Kuehne v Finanzamt Munich (( 1989 )) ECR 1925 ).*

*20 However, that ruling is based on the actual terms of Article 6(2)(a ), the aim of which is to prevent a situation wherein goods belonging to a business might eventually be used free of VAT through private use and which therefore requires the use of those goods to be taxed only if the VAT paid on the acquisition of the goods is deductible .*

*21 On the whole the Community system of VAT is the result of a gradual harmonization of national legislation pursuant to Articles 99 and 100 of the Treaty . The Court has consistently held that this harmonization, as brought about by successive directives and in particular by the Sixth Directive, is still only partial .*

*22 The harmonization is designed in particular to preclude double taxation, so that the deduction of input tax at each stage of taxation is an integral part of the system of VAT .*

*23 That objective has not yet been achieved, however, as is clear from Article 32 of the Sixth Directive, and nowhere in the common system of value-added tax, as it stands at present, are to be found the necessary bases for determining and laying down detailed rules for applying a common system of taxation enabling double taxation to be avoided in trade in second-hand goods .*

*24 Until the Community legislature has taken action, it is therefore necessary to continue to apply Article 32 of the Sixth Directive, which merely authorizes Member States that apply a special system of VAT to second-hand goods to retain that system but does not impose on them any obligation to introduce such a system if none exists .*

*25 The answer to the first question should therefore be that Community law and the Community rules governing VAT do not, as they now stand, preclude national legislation which, for the purpose of calculating the VAT payable on the turnover arising from the sale of second-hand goods, does not allow account to be taken of the tax still contained in the price of goods which have been purchased from non-taxable individuals with a view to their resale .*

*26 In the light of the reply to the first question, it is unnecessary to reply to the second question asked by the Gerechtshof, Amsterdam .*

# Decision on costs

*Costs*

*27 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable . Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step*

*in the action 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 Gerechtshof, Amsterdam, by order of 24 May 1988, hereby rules :*

*Community law and the Community rules governing VAT do not, as they now stand, preclude national legislation which, for the purpose of calculating the VAT payable on the turnover arising from the sale of second-hand goods, does not allow account to be taken of the tax still contained in the price of goods which have been purchased from non-taxable individuals with a view to their resale .*