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Opinion of Mr Advocate General Mischo delivered on 27 April 1989. - Wisselink en Co. BV and others v Staatssecretaris van Financiën. - References for a preliminary ruling: Hoge Raad - Netherlands. - First, Second and Sixth Directive on turnover tax - Special consumption tax on passenger cars. - Joined cases 93/88 and 94/88.

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Opinion of the Advocate-General

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Mr President,

Members of the Court,

1 . The two cases forming the subject of this Opinion are concerned with the question whether not the levying, alongside value-added tax, of a special tax charged on the supply and importation of passenger cars is compatible with the Community system of value-added tax .

2 . In the Netherlands, a special tax, the "Bijzondere Verbruiksbelasting van personenauto' s" (special consumption tax on passenger cars, hereinafter referred to as "the special tax ") is applied, whose main characteristics are as follows : the chargeable events are the supply of passenger cars in the Netherlands by manufacturers and the importation into the Netherlands of such cars; the taxable amount is the list price, net of value-added tax, applying at the time of the issue of the registration certificate; list price means the price recommended by the manufacturer or importer to his retailers for sales to the final consumer; in the case of secondhand cars, the taxable amount corresponds to a certain percentage of that price . At present, the special tax amounts to 18.2% for the part of the list price which is less than or equal to HFL 10 000 and 27.3% for the part of the list price in excess of HFL 10 000 . There is a zero rate for new cars manufactured in the Netherlands which are directly exported by a manufacturer . The tax is levied once only, namely at the stage to which I have just referred and is then passed on in full at the next marketing stage without any fresh taxation . Reimbursement of the special tax is possible on certain conditions if an imported car is subsequently re-exported as new . However, once a car has been registered in the Netherlands, it is regarded as having been in circulation and the special tax paid on it cannot be reimbursed . The sales invoice does not refer to the amount of special tax but does refer to the amount of value-added tax, where such tax is payable . Value-added tax is calculated on the sum of the net selling price and the special tax .

3 . As the Commission has rightly pointed out, the special tax is not a registration tax since the chargeable event is the supply in the Netherlands by the manufacturer or the importation and not the registration of the car . In any event, the special tax is not charged on secondhand cars resold

within the Netherlands .

4 . As for the circumstances in which a dispute arose between Wisselink and Abemij, on the one hand, and the Netherlands Secretary of State for Finance on the other, I refer to the Report for the Hearing .

5 . The dispute relates essentially to the question whether the special tax exhibits, notwithstanding its designation, the characteristics of turnover tax and whether it must therefore be regarded as prohibited by Article 33 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), which is worded as follows :

"Without prejudice to other Community provisions, the provisions of this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes ".

I - The first question

6 . The first question submitted by the Hoge Raad, which is the same in both cases, is worded as follows :

"Do the provisions of the First, Second and Sixth Directives preclude the levying of a special consumption tax on passenger cars as described in the reference for a preliminary ruling?"

A . The arguments derived from the legal basis of the special tax and the circumstances in which that tax was introduced

7 . Referring to the work preparatory to the adoption of the 1968 Netherlands Law on Turnover Tax which introduced the system of value-added tax, the plaintiffs in the main proceedings claim that the special tax must be regarded as constituting a partial retention of turnover tax in accordance with the system of cumulative multi-stage taxes which was applicable before the adoption of that law . The special tax is merely a disguised version of the former tax on turnover . What are we to make of this argument?

8 . It is undisputed that under the system established by the 1954 Netherlands Law on Turnover Tax the supply and importation of passenger cars were subject to the imposition of turnover tax at the higher rate of 25%, known as the luxury rate . Since the new law makes no provision for a higher rate of value-added tax, it is the normal rate of value-added tax of (at the time) 12% which has become applicable to passenger cars .

9 . In order to offset the difference between the fiscal burden borne by passenger cars before 1 January 1969 and the value-added tax rate of 12%, the Netherlands Government proposed that Parliament introduce, in a provision of the same draft law, an "equalization" tax on supplies by the manufacturer and imports of passengers cars, to be imposed alongside value-added tax . As a result of certain observations made by members of Parliament who were uncertain about the compatibility of that tax with the system of value-added tax, the designation "equalization tax" was changed into "special consumption tax on passenger cars ". The change of designation, however, was not accompanied by any substantive amendment . The legal basis of the special tax is therefore to be found in Article 50 of the new law on turnover tax, whose other provisions are concerned with value-added tax, and not in a specific law . That method enables, by means of a single reference, to apply by analogy to the special tax a series of definitions and detailed rules for levying the tax provided for by that law with regard to value-added tax . The plaintiffs consider that it is immediately apparent from those circumstances that the special tax is merely a specific type of

turnover tax .

10 . In response to that argument, however, it must be stated, as the United Kingdom points out in its observations, that the reasons for and the circumstances surrounding the introduction of the special tax are of no assistance in determining the objective nature of that tax . Its nature does not depend either on its designation or on the national legislative measures by which it was introduced . The fact that the provisions of national law on the implementation of value-added tax have also been employed for introducing the special tax and the fact that certain provisions of the national law are applicable to those two types of tax does not constitute sufficient evidence to state that, by introducing that tax in that manner, the Netherlands have failed to fulfil their obligations under the directives on value-added tax .

11 . In support of their argument, the plaintiffs further rely on the Court' s judgments in Cases 324/82 and 391/85, both involving the Commission and the Kingdom of Belgium . In the first of those judgments,(1) the Court had held in substance that, by retaining the catalogue price as the basis of charging value-added tax on cars instead of the price actually paid by the buyer, Belgium had applied the Sixth Directive incorrectly .

12 . Following that judgment, Belgium amended its legislation so that in future value-added tax was no longer calculated on the basis of the list price but on the basis of the price actually agreed between the buyer and the vendor . However, alongside that legislative amendment, Belgium also subjected new cars to a registration tax which was charged on the list price . The rate at which those two taxes were levied was identical and the amount paid by way of value-added tax was deducted from the amount to be paid by way of registration tax . In fresh proceedings instituted by the Commission against Belgium for failure to fulfil its obligations, the Court pointed out in its judgment of 4 February 1988 (in Case 391/85 ECR 579) that the Belgian legislation established a direct link between that registration tax and turnover tax inasmuch as it provided that if value-added tax had been paid at the time of supply or importation, the buyer qualified for exemption from registration tax up to the amount which had formed the taxable amount for value-added tax purposes . The Court came to the conclusion that the new tax, as far as its amount or even its very existence was concerned, did not constitute an independent tax but depended on the value-added tax payable on the same car . Elsewhere in the judgment, the Court pointed out that there was an inseparable and complementary relationship (2) between value-added tax and the registration tax .

13 . The Court therefore took the view that, by retaining in practice, under its legislation, the list price as the basis for the taxation of new cars, Belgium had failed to take the measures necessary to comply with the Court' s previous judgment and had failed to fulfil its obligations under the Treaty .

14 . It would seem, however, that there is no link between value-added tax and the Netherlands' special tax which is comparable to that established in connection with the Belgian taxes . Value-added tax and the special tax are genuinely independent of each other and are never offset against one another . It should also be borne in mind that the special tax is not mentioned on the invoice but forms part of the cost of the car and that value-added tax is charged on the total sum represented by the price of the car and the special tax . In those circumstances the Court' s reasoning in Case 391/85 cannot be applied in this case .

15 . Furthermore, it must be stated that the special tax is levied on only two categories of products, namely passenger cars and motor cycles, neither of which is involved in the manufacture of the other, and that it is charged once only, at a well-defined stage in their manufacturing or distribution chain . That tax cannot therefore be regarded as constituting a partial retention of the former cumulative multi-stage tax . It is not, therefore, contrary to the First Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (Official Journal, English Special Edition 1967, p . 14), whose aim was the elimination of cumulative multi-

stage tax systems and the adoption by all the Member States of a common system of value-added tax .

16 . As for the second directive adopted by the Council on the same date, it defines the structure and the detailed rules of application of the common system of value-added tax (Official Journal, English Special Edition 1967, p . 16) and it is therefore irrelevant in the circumstances of this case . Moreover, it was replaced by the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes, which was cited above .

17 . However, the plaintiffs also claim that the special tax is contrary to the ratio legis of the system of value-added tax and that it is incompatible with the intention expressed by the Council to make further progress in the effective removal of restrictions on the movement of persons, goods, services and capital and the integration of national economies (third recital in the preamble to the Sixth Directive). I shall therefore consider the special tax from that angle .

B . The special tax and intra-Community trade

18 . It is clear both from the recitals in the preamble to the First Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes and from Articles 1 and 4 of that directive (which are still in force) that, by introducing value-added tax, the Council intended to pursue two objectives .

19 . The priority objective was to remove cumulative multi-stage tax systems and thereby bring to an end any measures providing for flat-rate equalization of turnover taxes on importation or exportation which led to restrictions on trade and to distortions of competition between Member States .

20 . With the former cumulative multi-stage taxes it was not possible to ascertain precisely what tax burden was actually borne by goods which had been through a number of manufacturing or distribution stages . The Member States had therefore provided for flat-rate remissions of tax on exportation which could entail a subsidy element and countervailing taxes on importation which were liable to bear more heavily upon imported products than upon domestically manufactured products . The system of value-added tax eliminates that problem by rendering the taxation borne by each product transparent . It leads to neutrality in competition, inasmuch as within each country similar goods bear the same tax burden, whatever the length of the production and distribution chain . Since it is now possible to ascertain the amount of the burden borne by goods of domestic origin, an exact equalization of that burden is possible with regard to imports and exports . Imported goods are subject to the same rate of value-added tax as goods manufactured in the importing Member States and value-added tax on exported goods is remitted exactly up to the amount of tax which they have borne .

21 . The distortions of competition described above cannot occur in the case of a tax which is not a "cumulative multi-stage" tax, that is to say a tax whose incidence may be calculated with precision because it has been levied on the goods once only and at a well-defined stage . Since, as we have seen, the special tax exhibits that characteristic, it is not contrary to the first objective pursued by the Community through the establishment of the system of value-added tax .

22 . Only cars which have been imported and re-exported without having been used qualify for reimbursement of the special tax and that reimbursement is identical to the amount of the tax . It does not therefore include any flat-rate sum which may be regarded as a aid to exports . Conversely, a car manufactured in another Member State will bear, upon importation into the Netherlands, the same special tax as that borne by domestically manufactured cars . Accordingly, that taxation does not give rise to any protective effect and is not therefore contrary to Article 95 of the Treaty .

23 . However, the plaintiffs in the main proceedings claim that secondhand cars which Netherlands owners may wish to sell in another Member State are at a competitive disadvantage because the special tax, which is paid when those cars are purchased, cannot be reimbursed under the Netherlands legislation . Furthermore, since it is not value-added tax, the tax authorities of the importing country are not obliged to take account of the special tax still contained in the selling price of a car of that kind.(3)

24 . In that regard, however, it is appropriate to recall the Court' s judgment in Hulst,(4) from which it is apparent that :

"an internal levy on sales of a product is incompatible with the prohibition of discrimination embodied in the EEC Treaty when it falls more heavily on exports sales than on sales on the national market or when the revenue from the levy is designed to place national products at an advantage ".

That is manifestly not the case with the special tax .

25 . The Court' s judgment in Statens Kontrol is likewise of interest in that connection.(5) Finally, I would recall that, so far as importation is concerned, that is to say the reverse situation of that which is at issue here, the Court stated in its judgment in Peureux(6) that :

"Although Article 95 prohibits any Member State from imposing internal taxation on products imported from other Member States in excess of that on national products, it does not prohibit the imposition on national products of internal taxation in excess of that on imported products . Disparities of this kind do not come within the scope of Article 95, but result from special features of national laws which have not been harmonized in spheres for which the Member States are responsible ".

In this case, it is the same type of discrepancy between the laws of the Member States which inevitably places at a disadvantage Netherlands nationals who wish to sell secondhand cars in other Member States .

26 . The plaintiffs also claim that persons who engage in the Netherlands in the renting-out of vehicles to foreign tourists are also exposed to distortions of competition . As a result of the special tax, Netherlands rental firms have much higher costs than rental firms in other Member States . That difference becomes apparent primarily when rental firms in different Member States operate on the same market, in particular the United States market . Inclusive travel arrangements in Europe, which are offered to tourists or United States businessmen and which include the rental of a passenger car or a motorized caravan (on which the special tax on passenger cars is also levied) are far cheaper when they originate in other Member States than when they emanate from the Netherlands, which constitutes a disruption in the free movement of goods and services resulting solely from the levying of the special tax on passenger cars .

27 . The only answer to that argument is that it is another inevitable consequence of the differences in national legislation . Furthermore, the differences between the rates of value-added tax applied by the Member States on cars, which vary from 12% in Luxembourg to 38% in Italy,

are themselves liable to give rise to distortions of competition of the same type with regard to car rentals .

28 . The Netherlands special tax does not therefore create any unlawful barriers to the free movement of goods .

29 . The second objective pursued by the Community institutions through the establishment of the system of value-added tax, the final objective as it were, is ultimately to achieve the abolition of the imposition of tax on importation and the remission of tax on exportation in trade between Member States (Article 4 of the First Directive). It cannot be denied that the existence, alongside value-added tax, of taxes such as the special tax will undoubtedly make it more difficult to establish "a common market ... whose characteristics are similar to those of a domestic market" (first recital in the preamble to the First Directive). On the assumption that the rates of value-added tax applied by the Member States are harmonized one day, the continued existence of special taxes such as the Netherlands special tax will continue to entail the imposition of tax on importation and the remission of tax on exportation .

30 . The political institutions of the Community will therefore still be faced in that respect with a problem of harmonization which will be all the more difficult since three-quarters of the Member States do not impose taxes of that kind . However, that problem cannot affect the proper assessment of the legal nature of the special tax . It constitutes an obstacle to the attainment of the internal market, similar to that resulting from differences between the rates of excise duty, but it is not an obstacle to the normal functioning of the system of value-added tax .

31 . It is therefore possible to conclude that the special tax does not conflict either with the ratio legis of the directives on the common system of value-added tax or with the principle of non-discrimination underlying Article 95 of the Treaty . However, must the special tax none the less be held to be unlawful on the ground that it is contrary to the Sixth Directive?

C . Can value-added tax and another indirect tax be levied cumulatively?

32 . The plaintiffs in the main proceedings claim, in the first place, that Member States are not permitted to add to value-added tax still more taxes on turnover or consumption which are borne by the same goods or services, except under the express derogation set out in Article 33 of the Sixth Directive . That assertion needs to be qualified .

33 . As the Commission recalled in its observations (p . 14),

"Community harmonization relates at present only to turnover tax . Other indirect consumer taxes fall within the Member States' sovereign powers in so far as there are no specific provisions of Community law ".

34 . With the framework of Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (Official Journal 1983 L 105, p . 64), the Community legislature itself provided for the cumulative imposition of value-added tax with other taxes since the tax exemption applicable to permanent imports of personal property by an individual introduced by that directive does not cover certain duties and taxes including

"those concerning the use of those goods within the country, such as, for example, the duties levied on the registration of motor vehicles ".

35 . The Commission rightly adds that the Sixth Directive likewise leaves no doubt as to the fact that the cumulation of national taxation with value-added tax is not excluded a priori . The Commission refers in that regard to the provisions of Article 11B(3)(a) and 13B of that directive .

36 . Finally, in its judgment of 8 July 1986 in Case 73/85 Kerrutt v Finanzamt Moenchengladbach-Mitte ((1986)) ECR 2219, the Court stated quite clearly that it follows from Article 33 of the Sixth Directive that Community law as it now stands does not contain any specific provision excluding or limiting the power of Member States to introduce taxes other than turnover taxes and thus permits such taxes to be levied even where the charging of such taxes on a transaction which is already subject to value-added tax may result in the double taxation of that transaction . Since, therefore, the principle of cumulative taxation cannot be called in question, everything depends on the question of whether the tax in question, in view of its specific characteristics, may be regarded as one of the types of tax listed in Article 33 of the Sixth Directive which Member States are still permitted to maintain or introduce .

D . The question whether or not the special tax constitutes an excise duty

37 . The plaintiffs in the main proceedings consider that it is necessary to establish whether or not the special tax constitutes an excise duty, in which case the levying of the tax would be authorized . If not, it would constitute a tax having the character of a turnover tax, which is prohibited by Article 33 of the Sixth Directive . In their view, the term "excise duties" in Article 33 refers exclusively to excise duties in the strict sense . In that regard, only a strict interpretation can come within the framework of the harmonization of turnover taxes . Although excise duties exist under Netherlands tax law, the "special consumption tax on passenger cars" is never listed amongst them . It does not therefore constitute an excise duty in the strict sense of the term .

38 . Nor, moreover, is the special tax an excise duty in the substantive sense of the word . Excise duty can be levied only on non-durable consumer goods and the method of levying the special tax (ad valorem duty) differs from the method of levying excise duties (specific duty).

39 . The Commission, the Netherlands Government and the United Kingdom maintain, on the other hand, that although the majority of excise duties are effectively levied on goods which are consumables (for instance, beer, other alcoholic beverages, sugar, petrol and toiletries) and although their rate is generally calculated by reference to the quantity or weight of the goods or its alcoholic strength, there are also excise duties comprising at least in part an ad valorem duty . In particular, that is so in the case of excise duties on manufactured tobacco, whose structure was harmonized at the Community level by Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco.(7) Those excise duties are made up of two components : a specific duty calculated per unit of the product and an ad valorem duty calculated on the retail selling price .

40 . Moreover, the Commission has pointed out that in Denmark, Greece and Italy taxes are levied on certain photographic equipment, sound recording and reproduction equipment, television sets, etc ., that is to say consumer durables, which are termed excise duties and are calculated on an ad valorem basis .

41 . The Netherlands Government and the United Kingdom consider, therefore, that the Netherlands special tax can be treated as an excise duty .

42 . As for the argument based on the fact that under Netherlands law the special tax is not regarded as an excise duty in the strict sense of the word, I would point out that the expression "excise duties" used in Article 33 of the Sixth Directive must have a Community character since, otherwise, the uniform application of that provision in all the Member States would not be guaranteed . It would be sufficient for a Member State to classify a tax as an excise duty in order

to escape the prohibition laid down in the second part of that provision . Moreover, I fail to understand the meaning of the statement entered in the minutes of the Council, relating to Article 33, to whose existence reference is made by the Commission . According to that statement, "the Council and the Commission declare that this provision does not preclude a Member State from maintaining or introducing excise duties other than those expressly mentioned therein ". Article 33 does not mention any type of excise duty but refers, in general terms, to "excise duties ". If that statement means that the Member States may still introduce new excise duties, it says no more than Article 33 itself . If, on the other hand, that statement means that the Member States are free to designate as "excise duties" any kind of tax which they are likely to introduce, then it runs counter to the objection set out above .

43 . The expression "excise duties" in Article 33 cannot be regarded as referring to any tax classified as such by the national law of a Member State . It can refer only to excise duties which Community law treats as such by reason of their intrinsic nature . To my knowledge, no such definition exists yet .

44 . If it were necessary to establish such a definition in these proceedings, I would suggest the Court adopt the conventional meaning attached to that concept and state that taxes which are levied on certain well-defined non-durable consumer goods at a single stage and which consist wholly or in part of a specific duty, that is to say a duty calculated by reference to the quantity, weight or alcoholic strength of a product constitute excise duties .

45 . However, I do not consider it essential to take that step since Article 33 of the Sixth Directive permits the maintenance or introduction not only of excise duties, taxes on insurance contracts, taxes on betting and gambling and stamp duties, but also of "any taxes, duties or charges which cannot be characterized as turnover taxes ".

46 . It is sufficient, therefore, for the purposes of these proceedings, to consider whether or not the Netherlands special tax constitutes a turnover tax .

E . The legal nature of the "special tax"

47 . The Lexique des termes juridiques published by Dalloz (1988, p . 440) contains the following definition of turnover taxes :

"Generic name designating, in the broad sense, a number of indirect taxes, or parafiscal charges, whose common feature is that they are calculated as a percentage of the price of the products and services taxed . Value-added tax is by far the most important . Employed in the singular, the term is sometimes used in business circles as a synonym for value-added tax itself ".

48 . The history of indirect taxation in France (8) preceding the introduction of value-added tax in 1954/55 also demonstrates eloquently that turnover tax may take a variety of forms . It may be levied on all transactions, at every successive stage in the course of trade, without prejudice to the exemptions expressly laid down, but it may also be levied once only, at a single stage in the production or distribution chain .

49 . Although the tax is levied at several stages, it may be cumulative (so-called "multi-stage" tax) or non-cumulative (deduction of the tax paid by the producer himself). Finally, it may apply to certain well-defined products or, in principle, to all products or to a whole category of products .

50 . The conclusion can therefore be drawn that neither the number of marketing stages taxed nor the existence or absence of a right of deduction, nor the scope of a tax have any effect on the question whether or not the tax may be classified as a turnover tax .

51 . As the special tax is calculated as a percentage of the price of the cars supplied by a manufacturer or by an importer and is therefore linked to the latter' s turnover, it constitutes, in my view, a turnover tax in the sense generally given to that expression .

52 . The question remains whether Article 33 of the Sixth Directive refers to all taxes which may be classified as turnover taxes or whether it gives a more restricted meaning to that expression . In Case 295/84 Rousseau Wilmot,(9) the Court had to decide whether levies, such as the solidarity levy and the French mutual assistance charge, the rates of which were based on a company' s turnover, were prohibited by Article 33 . It considered that the question was whether such taxes could be characterized as turnover taxes within the meaning of the Sixth Directive (paragraph 9 of the judgment). The Court therefore considered that the concept of "turnover tax" had a specific scope in the context of Article 33 of the Sixth Directive . It stated that, in order to resolve the problem raised, the scope of Article 33 had to be determined in the light of the role of that provision in the harmonized system of turnover tax, which took the form of a common system of value-added tax (paragraph 14 of the judgment).

53 . It therefore analysed the principle of that system stating (in paragraph 15 of the judgment) that by virtue of Article 2 of the First Directive that principle consists in the application to goods and services of a general (10) tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which the tax is charged . After referring to the procedure for deduction, the Court concluded in paragraph 16 of the judgment that :

"In leaving the Member States free to maintain or introduce certain indirect taxes such an excise duties on the condition that they are not taxes which can be 'characterized as turnover taxes' , Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of value-added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to value-added tax ". 10

54 . In its judgment of 3 March 1988 in Case 252/86 Bergandi v Directeur-Général des Impôts ((1988)) ECR 1343, the Court took a similar approach . After recalling that the concept of taxes which can be characterized as turnover taxes was a Community concept in so far as it is relied upon with a view to the attainment of the objective pursued by Article 33, which is to ensure that the common system of value-added tax is fully effective, the Court set out in paragraph 14 of that judgment the same criteria as those contained in the aforesaid passage in Rousseau Wilmot .

55 . I suggest that the Court take the same approach in this case and ascertain whether the special tax exhibits the characteristics specified in the two aforesaid judgments .

56 . It must be stated that although the special tax is proportional to the price of the cars, it does not constitute a general tax since it is charged on only two categories of products, namely passenger cars and motor cycles . Nor can it be said that it is levied on the movement of goods and services and charged on commercial transactions in a way comparable to value-added tax since it is applied once only, at the time of supply by the manufacturer or of importation . Secondhand cars, other than those which are imported, are not subject to the special tax . We have seen, moreover, that the special tax does not compromise the functioning of the common system of value-added tax .

57 . I therefore suggest that the Court answer the first question submitted by the Hoge Raad in the two cases in the following terms :

"The provisions of the First, Second and Sixth Directives do not preclude the levying of a special consumption tax on passenger cars, as described in the reference for a preliminary ruling ".

II - The second question in each of the two cases

58 . The second question in Case 93/88 (Wisselink) is worded as follows :

"If so, must the conclusion be drawn that a taxable person may, pursuant to Article 17 of the Sixth Directive, deduct a special consumption tax on passenger cars borne by him in the manner described in the reference for a preliminary ruling from the tax which he is liable to pay, even if the national legislation makes no provision for such a deduction ".

59 . The second question submitted in Case 94/88 (Abemij and Others) is worded as follows :

"If so, must the conclusion be drawn that a special consumption tax on passenger cars such as that which the appellant is liable to pay under Netherlands legislation on account of the importation of passenger cars in the period to which the case relates may not be levied at all or that it must be levied on a different basis?"

60 . Since I have suggested that the Court should give a negative answer to the first question, the second question in each case is necessarily devoid of purpose .

61 . If, on the other hand, the Court should answer the first question in the affirmative, it would follow that a tax exhibiting the characteristics of the Netherlands special tax would be contrary to Community law since it would be caught by the prohibition laid down in Article 33 of the Sixth Directive .

62 . In that case, the answer to the second question submitted in Case 94/88 (Abemij and Others) would have to be that this kind of tax may not be levied at all . If it could not be levied at all, the problem of its deduction, raised in the second question in Case 93/88 (Wisselink), would no longer arise .

63 . In view of the substantial financial consequences which a declaration that this kind of tax is unlawful might have in the Netherlands and perhaps in other Member States, it would be advisable for the Court to hold that such illegality could not be relied upon in order to claim reimbursement of taxes paid before the date of the judgment, except by persons who instituted proceedings prior to that date .

(*) Original language : French .

(1)Judgment of 10 April 1984 in Case 324/82 Commission v Belgium ((1984)) ECR 1861 .

(2)Not emphasized in the text to which reference is made .

(3) See the judgment of 21 May 1985 in Case 47/84 Secretary of State for Finance v Schul ((1985)) ECR 1491 .

(4) Judgment of 23 January 1975 in Case 51/74 Hulst v Produktschap voor Siergewassen ((1975)) ECR 79 at paragraphs 34 to 36 .

(5)Judgment of 26 June 1978 in Case 142/77 Statens Kontrol Med Aedle Metaller v Larsen ((1978)) ECR 1543 .

(6)Judgment of 13 March 1979 in Case 86/78 Peureux v Services fiscaux de la Haute-Saône at du territoire de Belfort ((1979)) ECR 897 .

(7)Official Journal, English Special Edition 1972 (31 December), p . 3 .

(8)Trotabas,L . and Cotteret,J.M .: Driot fiscal, Paris, Dalloz, 1985, p . 195 .

(9) Judgment of 27 November 1985 in Case 295/84 Rousseau Wilmot v Organic ((1985)) ECR 3759 at 3767 .

(10) Not underlined in the original .