JUDGMENT OF THE COURT
13 February 1985 [1]

In Case 5/84

REFERENCE 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 Ltd

and

The Commissioners of Customs and Excise,

on the interpretation of Article 27 (5) of the Sixth Council Directive (No 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,

THE COURT,

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann and Y. Galmot, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

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1 — Language of the Case: English.

* after considering the observations submitted on behalf of
the plaintiff Direct Cosmetics by Sleigh & Son, Solicitors, and Mr D. Vaughan, Q.C.,
the United Kingdom by Mr J.R.J. Braggins, acting as Agent, assisted by Mr W.S. Hill, Barrister,
the Commission of the European Communities by Mr. D.R. Gilmour, acting as Agent,
after hearing the Opinion of the Advocate General delivered at the sitting on 4 December 1984,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By order dated 9 November 1983, which was received at the Court on 4 January 1984, the London Value-Added Tax Tribunal (hereinafter referred to as 'the London Tribunal') referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 11 and 27 of the Sixth Council Directive (No 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). The questions were raised in a dispute between Direct Cosmetics Ltd and the Commissioners of Customs and Excise (hereinafter referred to as 'the Commissioners') regarding the determination of the basis for charging value-added tax (VAT) on the transactions of that company, the appellant in the main proceedings.

Direct Cosmetics' selling scheme

2 Direct Cosmetics is a company which specializes 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 wrapped or packaged for a particular occasion, such as Christmas, but which could not be sold by the date on which the occasion occurred. Direct Cosmetics buys those products at low prices from manufacturers and re-sells them through agents in hospitals, factories and offices on the following conditions: the product is sold at Direct Cosmetics' catalogue price; if the selling agent pays the sale price to Direct Cosmetics within 14 days, he may retain a 20% discount, otherwise he must pay the full price.

3 It is established that the turnover of all of Direct Cosmetics' agents engaged in that activity is below the minimum limit laid down by United Kingdom legislation in

accordance with Article 24 of the Sixth Directive above which a person is liable to VAT. It appears from the order for reference that the dispute concerns the question whether Direct Cosmetics must pay VAT in accordance with the rule laid down in Article 11 A 1. (a), on the consideration actually obtained, or whether there is a derogation, covered by Article 27 of the Sixth Directive, which allows the United Kingdom tax authorities to tax Direct Cosmetics on the basis of the sale price to the consumer, without therefore deducting the discount which, if earned, forms the selling agents' remuneration.

The legal background to the dispute

4 By the Finance Act 1977, enacted on 29 July 1977, that is to say at the time when the United Kingdom introduced the measures needed to bring its tax legislation into line with the Sixth Directive, paragraph 2 of Schedule 3 of the Finance Act 1972 was amended and converted into paragraph 3, empowering the Commissioners charged with collecting VAT to issue directions to taxable persons in order to take into account, for the purpose of calculating the tax, the sale price to the final consumer where goods were sold through non-taxable persons. That provision was worded as follows:

'(3) Where it appears to the Commissioners:

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

(b) that those individuals are not taxable persons, and

(c) that it is necessary for the protection of the revenue to exercise their powers under this paragraph,

they may by notice in writing give directions to the taxable person for securing that the value by reference to which tax is charged on any such supply by him after the giving of the notice or after such later date as may be specified therein shall be determined as if the consideration given by any such individual for the supply were equal to the price at which the goods are sold by retail.'

5 On 28 December 1977, after those provisions had been put into effect, the United Kingdom notified the Commission, pursuant to Article 27 (5) of the Sixth Directive, of seven measures which it intended to retain, after the entry into force of that directive, as derogating measures of the kind permitted by Article 27 (1). The fourth item on the list mentioned 'Special Anti-Avoidance Valuation Provisions'. In Annex IV to the letter of notification those provisions are explained in the following terms:

'In the United Kingdom certain companies, in the field of cosmetics for example, sell their products to individuals who are outside the tax net for re-sale to the consumer. The Commissioners of Customs and Excise have power under Schedule 3, paragraph 2 of the Finance Act 1972 to prevent avoidance of tax on the retail margin by requiring sales to these individuals to be taxed on their retail value.'

6 It appears from the order for reference that in 1979 an undertaking using selling methods similar to those of Direct Cosmetics in order to sell greeting cards, Club Centre of Leeds Ltd appealed to the Manchester Value-Added Tax Tribunal which, by decision of 16 December 1980 [1980] VAT Tribunal Reports, p. 135), allowed the appeal. In its decison the Manchester Value-Added Tax Tribunal interpreted the words 'necessary for the protection of the revenue' as meaning that the tax administration must not only show that a certain selling method is likely to diminish its revenue but also that the taxpayer deliberately arranged his business with a view to reducing his tax liability.

7 It is clear from the documents before the Court that the tax administrtion did not appeal against the decision of the Manchester Value-Added Tax Tribunal but the Government, acting on a proposal from the Commissioners, decided to resolve the problem created by that judgment by legislation. By section 14 (1) of the Finance Act 1981, paragraph 3 of Schedule 3 of the Finance Acts of 1972 and 1977 was replaced by a new provision which was in substance identical to the 1977 provision except that the condition concerning 'the protection of the revenue' was repealed. The provision in question is worded as follows:

'(3) 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 may, 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 therein shall be taken to be its open market value on a sale by retail.'

The subject-matter of the dispute before the Tribunal

8 On 7 December 1982 the Commissioners issued a direction to Direct Cosmetics under the provision of the Finance Act 1981 cited above. It was in the following terms:

'The Commissioners of Customs and Excise hereby direct that after 10 December 1982 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 Finance Act 1972,

(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.'

9 It is clear from the direction that, in the opinion of the tax administration, the value to be taken into consideration for determining the basis for charging tax must be the retail price paid by the final consumer and not the price paid to Direct Cosmetics by its agents, that is to say the retail price less, where earned, the discount.

10 Direct Cosmetics appealed against that direction to the London Value-Added Tax Tribunal. It contended *inter alia* that the amendment of Schedule 3 of the Finance Acts of 1972 and 1977 by the Finance Act 1981, consisting in the deletion of the words 'necessary for the protection of the revenue', from the 1977 version, constituted a derogation from Article 11 A 1. (a) of the Sixth Directive which had not been authorized in accordance with the requirements of Article 27 (1) and (2) of that directive.

11 The Commissioners, on the other hand, argued that the amendment made by the Finance Act 1981 did not affect the substance of the previous provision so that the new provision was covered by the notification made on 28 December 1977 under Article 27 (5) of the directive.

12 After referring in its order for reference to the decision of the Manchester Value-Added Tax Tribunal, the London Tribunal explains that, according to the principles of interpretation of English law, the amendment made by the Finance Act 1981 is one of substance and that therefore the measure ought to be considered a new measure within the meaning of Article 27 of the Sixth Directive. However, according to the London Tribunal, it does not necessarily follow that the Court of Justice, applying the criteria of Community law, would reach the same conclusion.

13 The London Tribunal is therefore of the opinion that there are grounds for referring questions to the Court of Justice, especially as it is aware of other cases pending in which the same point arises. It therefore states two questions, worded as follows:

(1) Where national legislation notified under Article 27 (5) of Directive No 77/388/EEC of the Council 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) is amended by the deletion of a reference to the criterion of protection of the national revenue, does this amendment constitute a 'special measure' within the meaning of Article 27 (1) requiring the Member State to inform the Commission under Article 27 (2)?

(2) If the answer to the first question is in the affirmative, where a Member State fails to comply with Article 27 (2) of the directive by not informing the Commission of the special measure derogating from the provisions of Article 11 A 1. (a) of the directive requiring the authorization of the Council under Article 27 (1), does that failure give rights to an individual which may be relied on before the national courts of a Member State, which rights would be founded directly upon the provisions of Article 11 A 1. (a)?

The first question

14 The first question is designed to ascertain whether a provision of national legislation, amending a previous measure which had been notified in accordance with Article 27 (5) of the Sixth Directive and which referred to the 'protection of the revenue', constitutes a 'special measure' within the meaning of Article 27 (1) of the directive, subject as such to notification, if the new provision omits that reference.

15 In this regard Direct Cosmetics contends that the legislative amendment made by the Finance Act 1981, the effect of which was to delete the words 'for the protection of the revenue' appearing in the Schedule to the Finance Act 1972, as amended by the Finance Act 1977, constitutes a substantial amendment of the measure notified on 28 December 1977 under Article 27 (5) of the Sixth Directive as a 'special measure' for preventing tax evasion. It argues that the deletion of the words 'for the protection of the revenue' shows that not only is a new measure within the meaning of Article 27 involved but also that the measure goes well beyond the limits permitted by that article in so far as the measures allowed thereunder may not derogate from the basis for charging VAT set out in Article 11 except to the extent strictly necessary for preventing tax evasion or avoidance, as the Court recently held in its judgment of 10 April 1984 in Case 324/82, *Commission* v *Kingdom of Belgium*, [1984] ECR 1861. The proof that the measure originally notified has been widened is the fact that Direct Cosmetics, which under the previous provisions had escaped liability to tax, is liable to tax under the direction based on the new provisions introduced by the Finance Act 1981. Direct Cosmetics therefore considers that the answer to the first question must be that the legislative amendment introduced by the Finance Act is a 'special measure' within the meaning of Article 27 (1) of the Sixth Directive and that therefore it ought to have been notified, as laid down in Article 27 (2).

16 The United Kingdom argues that there is no substantial difference between the provisions of the Finance Act 1972, as amended in 1977, and the provisions of the Finance Act 1981. Since the objectives of the previous legislation were frustrated by the decision of the Manchester Value-Added Tax Tribunal in the *Club Centre of Leeds* case, it appeared that the notification to the Commission in 1977 was a notification of a legal provision which could not achieve the aims summarized in the notification itself. In order, therefore, to achieve precisely the same objectives as were summarized in that notification, it appeared to the United Kingdom, after the *Club Centre of Leeds* case, to be necessary to re-enact the 1972/77 legislation in a form which was totally consistent with those objectives. Since the 1981 legislation successfully achieved the intentions of the United Kingdom as notified in 1977, any further notification would have been otiose. Consequently, the United Kingdom was under no obligation to inform the Commission of anything, there being no 'special measure' which attracted the operation of paragraph (2) of Article 27.

17 In its oral observations the United Kingdom pointed out that selling schemes such as those operated by Club Centre of Leeds and Direct Cosmetics, whatever the motives behind them, are not only liable to diminish the revenue but they also affect conditions of competition between undertakings operating such methods and those liable to pay the tax. It points out that the aims of the VAT system are clearly stated in the preamble to the first harmonization directive in so far as it refers to the elimination of factors which may distort conditions of competition, whether at national or Community level, and stresses the fact that the highest degree of neutrality of the tax system is achieved when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution (First Council Directive [No 67/227/EEC] of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes, Official Journal, English Special Edition 1967, p. 14, third and fifth recitals in the preamble).

18 As its observations now stand, the Commission takes the view that, since the measure notified in 1977 became inoperative owing to the judgment delivered by the competent tribunal, it seems that there was an error in the notification process at that time. Consequently, failing notification of the new legislative measure enacted in 1981, there is no valid derogation under Article 27 of the directive. The 1981 legislation involved a substantial change compared with the previous legal situation and fresh notification was therefore required. However, the Commission emphasizes that, if a new measure having the same substance as the 1977 measure had been notified, it would not have raised any objections. It draws particular attention to the fact that, since the United Kingdom has fixed a relatively high threshold for the exemption permitted by Article 24 of the directive, it seems natural that precautions should be taken on the other hand to ensure that certain forms of marketing, such as the scheme operated by Direct Cosmetics, do not benefit from the exemption.

19 The question raised by the London Tribunal must be resolved in the light of the scheme of Article 27 of the Sixth Directive, the provisions of which must now be considered.

20 The first paragraph of Article 27 provides that the Council may authorize any Member State to introduce special measures derogating from the provisions of the directive, either in order to simplify the procedure for charging the tax or to prevent 'certain types of tax evasion or avoidance'.

21 Paragraphs (2), (3) and (4) provide that a Member State wishing to introduce the measures referred to in paragraph (1) must inform the Commission of them and provide it with all relevant information. The Commission must inform the other Member States of the proposed measures within one month. If neither the Commission nor any Member State has requested that the matter be raised by the Council, the Council's approval is deemed to have been given within two months of the other Member States' being informed. If, on the other hand, either the Commission or a Member State has requested that the matter be raised by the Council, the Council may not authorize the measure except by acting unanimously on a proposal from the Commission.

22 As regards special measures of the type referred to in paragraph (1) which were in force at the time when the directive entered into effect, which was on 1 January 1977, paragraph (5) provides that the Member States may retain them provided that they notified the Commission of them before 1 January 1978.

23 In its judgment of 10 April 1984 in Case 324/82, cited above, the Court stressed that measures intended to prevent tax evasion or avoidance may not derogate from the basis for charging VAT laid down in Article 11 except 'within the limits strictly necessary for achieving that aim'.

24 It follows from the foregoing that new special measures derogating from the directive do not accord with Community law unless, on the one hand, they remain within the limits of the aims referred to in Article 27 (1) and, on the other hand, they have been notified to the Commission and have been impliedly or expressly authorized by the Council in the circumstances specified in paragraphs (1) to (4) of Article 27.

25 In the light of those considerations, it should be stated first of all that the measure notified by the United Kingdom in 1977 expressly referred to the legislative provision introduced by the Finance Act 1977 into Schedule 3 of the Finance Act 1972. That notification became ineffective from the moment at which the measure in question was replaced by a new provision under the Finance Act 1981, unless it is shown that the new provision may be regarded as being substantially the same as the previous provision. The answer to that question must be obtained by comparing the previous provision with the new provision.

26 It must be pointed out in this regard that the new version of paragraph 3 of Schedule 3 of the Finance Act 1981 differs from the previous version by omitting the words 'for the protection of the revenue'. According to the London Tribunal as quoted above, the alteration made to the text by the deletion of those words is one of substance in English law and cannot be said to be confined to procedural enforcement.

27 As the United Kingdom Government has pointed out, the words 'for the protection of the revenue' appearing in the previous version were the equivalent of the words 'to prevent certain types of tax evasion or avoidance' used in the Sixth Directive. By the deletion of those words, any apparent link to the exceptions laid down in Article 27 (1) of that directive was severed and the power of derogation accorded to the Commissioners was widened indefinitely as far as concerns the selling methods covered by the 1977 notification, so that the question arises whether the new provisions are still within the limits of the derogations allowed by Article 27.

28 With reference to the question raised by the London Tribunal it need only be stated in this regard that a change such as that introduced by the Finance Act 1981 is in any event a substantial change compared with the measure notified in 1977 because it omits the very element which linked that measure to the Sixth Directive. Only a notification effected in conformity with paragraph (2) of Article 27 would have enabled the Commission and, where appropriate, the Council to verify whether the new measure was still consistent with the aim laid down in paragraph (1) of that article.

29 The answer to the first question must therefore be that where national legislation, notified under Article 27 (5) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes, is amended by the deletion of a reference to the criterion of protection of the national revenue, such an amendment constitutes a 'special measure' within the meaning of Article 27 (1) requiring the Member State to inform the Commission under Article 27 (2).

The second question

30 The second question is designed to ascertain whether, if a measure derogating from the provisions of the Sixth Directive has not been notified and has not, where necessary, undergone an authorization procedure under Article 27, individuals may rely before the national courts of a Member State on a right to be treated in accordance with the provisions of Article 11 A 1. (a) of the directive, that is to say the right to be taxed on the basis of the price actually received in exchange for the supply of goods or services.

31 In the view of Direct Cosmetics, the failure by a Member State to fulfil an obligation to notify a measure and to have regard to the need for authorization or the breach of substantive rules of Community law cannot be matters of no concern to individuals or matters concerning only the relations between Member States. According to the consistent case-law of the Court, failure by a Member State to comply with the preconditions necessary for introducing a national measure means that the authorities of that Member State are not entitled to rely upon national provisions adopted without having had recourse to such necessary procedures, in derogation from provisions of binding Community law. Direct Cosmetics refers in this regard to the judgments of the Court in Case 88/77, *Minister for Fisheries* v *Schonenberg*, [1978] ECR 473, Case 130/78, *Salumificio di Cornuda SpA* v *Amministrazione delle Finanze dello Stato*, [1979] ECR 867, Case 269/80, *Regina* v *Tymen*, [1981] ECR 3079 and Case 8/81, *Becker* v *Finanzamt Münster-Innenstadt*, [1982] ECR 53 in which the Court held that a Member State may not rely, as against an individual, on provisions of its national legislation which are not in accordance with the obligations imposed by Community law.

32 The United Kingdom contends first of all that in Community law there is no principle that, if a Member State fails to fulfil an obligation to notify, consult or inform the Council or the Commission, any measure adopted by that State is necessarily rendered incompatible with Community law. It is necessary in each case to consider the nature and purpose of the obligation to notify, consult or inform the Council or the Commission in order to determine whether or not a failure to comply with such an obligation disturbs the functioning of the Common Market so fundamentally that national measures adopted under such conditions must be regarded as ineffective. The United Kingdom refers in this regard to the judgment in Case 27/78, *Amministrazione delle Finanze dello Stato* v *Rasham*, [1978] ECR 1761 in which the Court held that a notification required by the

Treaty (in that case, by the second paragraph of Article 115) was not a condition precedent for the entry into force of certain protective measures adopted by the Member States. In the United Kingdom's view, the present situation is not without analogy with the situation which the Court had to consider in that case. In addition, the United Kingdom contrasts the terms of Article 27 of the Sixth Directive with the corresponding provisions in Article 13 of the Second Directive, No 67/228/EEC of 11 April 1967 (Official Journal, English Special Edition 1967, p. 16). Article 13 prohibited, in terms, Member States from applying national measures before the Community authorities had adopted their decision. There is no such prohibition in the Sixth Directive. From this the United Kingdom concludes that in the present case the breach of the obligation to notify cannot be considered so serious as to deprive the measure in question of its validity or effectiveness.

33 Secondly, the United Kingdom, relying on the relevant case-law of the Court, starting with the judgment of 15 July 1964 in Case 6/64, *Costa* v *ENEL*, [1964] ECR 585 and continuing up to the judgment of 19 January 1982 in the *Becker* case, cited above, contends that the Court has always considered that, in order for a provision of Community law to be relied upon before national courts, it must be sufficiently precise and unconditional and must not require further action on the part of the Community or the Member States. The United Kingdom points out that in the judgment in *Costa* v *ENEL* the Court held with regard to Article 102 of the EEC Treaty, which lays down an obligation to consult the Commission, that the Member States have undertaken 'an obligation to the Community which binds them as States' but which does not create individual rights which national courts must protect. The United Kingdom considers that Article 27 of the Sixth Directive is not directed at the relations between the Member State and individuals either, but is in reality a 'contractual' obligation as between the Member States and the Community, such as was created by Article 102 of the Treaty. By its nature Article 27 is not capable of creating rights for individuals which national courts must protect. A failure to notify cannot therefore alter the effectiveness of national special measures so far as they concern individuals.

34 The Commission points out that, even though it could have approved of the aim of the measure in question, in the circumstances there is no valid derogation under Article 27 of the directive and that, for that reason, the principle embodied in Article 11 may be relied upon by individuals.

35 The answer to the second question raised by the London Tribunal calls for a preliminary observation. It is not disputed that Article 11 A 1. (a) of the Sixth Directive, which provides that the taxable amount shall be, in respect of supplies of goods and services, everything which constitutes the consideration obtained from the purchaser by the supplier subject to the tax, has been duly incorporated into the fiscal legislation of the United Kingdom. Therefore, the contents of Article 11 A 1. (a) of the directive also constitute a rule of national law applicable to any person subject to the VAT system.

36 It is also clear from the foregoing that, at the material time and as far as the subject-matter of the dispute is concerned, there was no 'special measure' derogating from the directive which had been implemented in accordance with the provisions of Article 27 of the directive.

37 By virtue of the third paragraph of Article 189 of the Treaty, Member States are bound to observe all the provisions of the Sixth Directive in so far as a derogation has not been established in accordance with Article 27. The tax authorities of a Member State may not therefore rely, as against a taxable person, on a provision derogating from the scheme of the directive and enacted in breach of the duty of notification imposed on Member States by Article 27 (2) without disregarding that Member State's obligation under Article 189.

38 The answer to the second question must therefore be that a Member State which has failed to fulfil its obligation under Article 27 (2) of the Sixth Directive by not informing the Commission of a special measure derogating from the provisions of Article 11 A 1. (a) of the directive and thus requiring the authorization of the Council under Article 27 (1) may not rely on that measure as against an individual seeking before the national courts the application of provisions of revenue law adopted in conformity with Article 11 A 1. (a) of the directive.

Costs

39 The costs incurred by the United Kingdom and by 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 appeal pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the London Value-Added Tax Tribunal by order of 9 November 1983, hereby rules:

(1) Where national legislation, notified under Article 27 (5) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes is amended by the deletion of a reference to the criterion of protection of the national revenue, such an amendment constitutes a 'special measure' within the meaning of Article 27 (1) requiring the Member State to inform the Commission under Article 27 (2).

(2) A Member State which has failed to fulfil its obligation under Article 27 (2) of the Sixth Directive by not informing the Commission of a special measure derogating from the provisions of Article 11 A 1. (a) of the directive and thus requiring the authorization of the Council under Article 27 (1) may not rely on that measure as against an individual seeking before the national courts the application of provisions of revenue law adopted in conformity with Article 11 A 1. (a) of the directive.

Mackenzie Stuart Bosco Due Kakouris

Pescatore Koopmans Everling Bahlmann Galmot

Delivered in open court in Luxembourg on 13 February 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President