COUNCIL DIRECTIVE 94/5/EC

of 14 February 1994

supplementing the common system of value added tax and amending Directive 77/388/EEC — Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 99 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the Economic and Social Committee [2],

Whereas, in accordance with Article 32 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 [3], the Council is to adopt a Community taxation system to be applied to used goods, works of art, antiques and collectors' items;

Whereas the present situation, in the absence of Community legislation, continues to be marked by the application of very different systems which cause distortion of competition and deflection of trade both internally and between Member States; whereas these differences also include a lack of harmonization in the levying of the own resources of the Community; whereas consequently it is necessary to bring this situation to an end as soon as possible;

Whereas the Court of Justice has, in a number of judgments, noted the need to attain a degree of harmonization which allows double taxation in intra-Community trade to be avoided;

Whereas it is essential to provide, in specific areas, for transitional measures enabling legislation to be gradually adapted;

Whereas, within the internal market, the satisfactory operation of the value added tax mechanisms means that Community rules with the purpose of avoiding double taxation and distortion of competition between taxable persons must be adopted;

Whereas it is accordingly necessary to amend Directive 77/388/EEC,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/388/EEC is hereby amended as follows:

1. in Article 11

   (a) the following paragraph shall be added to Title A:

   '4. By way of derogation from paragraphs 1, 2 and 3, Member States which, on 1 January 1993, did not avail themselves of the option provided for in the third subparagraph of Article 12 (3) (a) may, where they avail themselves of the option provided for in Title B (6), provide that, for the transactions referred to in the second subparagraph of Article 12 (3) (c), the taxable amount shall be equal to a fraction of the amount determined in accordance with paragraphs 1, 2 and 3.

   That fraction shall be determined in such a way that the value added tax thus due is, in any event, equal to at least 5 % of the amount determined in accordance with paragraphs 1, 2 and 3.';

   (b) the following paragraph shall be added to Title B:

   '6. By way of derogation from paragraphs 1 to 4, Member States which, on 1 January 1993, did not avail themselves of the option provided for in the third subparagraph of Article 12 (3) (a) may provide that for imports of the works of art, collectors' items and antiques defined in Article 26a (A) (a), (b) and (c), the taxable amount shall be equal to a fraction of the amount determined in accordance with paragraphs 1 to 4.

   That fraction shall be determined in such a way that the value added tax thus due on the import is, in any event, equal to at least 5 % of the amount determined in accordance with paragraphs 1 to 4.';

2. in Article 12:

   (a) paragraph 3 (c) shall be replaced by the following:

   '(c) Member States may provide that the reduced rate, or one of the reduced rates, which they

[1] OJ No C 323, 27. 12. 1989, p. 120.
[2] OJ No C 201, 7. 8. 1989, p. 6.
[3] OJ No L 145, 13. 6. 1977, p. 1. Directive as last amended by Directive 92/111/EEC (OJ No L 384, 30. 12. 1992, p. 47).

apply in accordance with the third paragraph of (a) shall also apply to imports of works of art, collectors' items and antiques as referred to in Article 26a (A) (a), (b) and (c).

Where they avail themselves of this option, Member States may also apply the reduced rate to supplies of works of art, within the meaning of Article 26a (A) (a):

— effected by their creator or his successors in title,

— effected on an occasional basis by a taxable person other than a taxable dealer, where these works of art have been imported by the taxable person himself or where they have been supplied to him by their creator or his successors in title or where they have entitled him to full deduction of value-added tax.';

(b) paragraph 5 shall be replaced by the following:

'5. Subject to paragraph 3 (c), the rate applicable on the importation of goods shall be that applied to the supply of like goods within the territory of the country.';

3. the following Article shall be inserted:

'Article 26a

Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques

A. *Definitions*

For the purposes of this Article, and without prejudice to other Community provisions:

(a) *works of art* shall mean the objects referred to in (a) of Annex I.

However, Member States shall have the option of not considering as "works of art" the items mentioned in the final three indents in (a) in Annex I;

(b) *collectors* items shall mean the objects referred to in (b) of Annex I;

(c) *antiques* shall mean the objects referred to in (c) of Annex I;

(d) *second-hand goods* shall mean tangible movable property that is suitable for further use as it is or after repair, other than works of art, collectors' items or antiques and other than precious metals or precious stones as defined by the Member States;

(e) *taxable dealer* shall mean a taxable person who, in the course of his economic activity, purchases or acquires for the purposes of his undertaking, or imports with a view to resale, second-hand goods and/or works of art, collectors' items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale;

(f) *organizer of a sale by public auction* shall mean any taxable person who, in the course of his economic activity, offers goods for sale by public auction with a view to handing them over to the highest bidder;

(g) *principal of an organizer of a sale by public auction* shall mean any person who transmits goods to an organizer of a sale by public auction under a contract under which commission is payable on a sale subject to the following provisions:

— the organizer of the sale by public auction offers the goods for sale in his own name but on behalf of his principal,

— the organizer of the sale by public auction hands over the goods, in his own name but on behalf of his principal, to the highest bidder at the public auction.

B. *Special arrangements for taxable dealers*

1. In respect of supplies of second-hand goods, works of art, collectors' items and antiques effected by taxable dealers, Member States shall apply special arrangements for taxing the profit margin made by the taxable dealer, in accordance with the following provisions.

2. The supplies of goods referred to in paragraph 1 shall be supplies, by a taxable dealer, of second-hand goods, works of art, collectors' items or antiques supplied to him within the Community:

— by a non-taxable person,

or

— by another taxable person, in so far as the supply of goods by that other taxable person is exempt in accordance with Article 13 (B) (c),

or

— by another taxable person in so far as the supply of goods by that other taxable person qualifies for the exemption provided for in Article 24 and involves capital assets,

or

— by another taxable dealer, in so far as the supply of goods by that other taxable dealer was subject to value added tax in accordance with these special arrangements.

3. The taxable amount of the supplies of goods referred to in paragraph 2 shall be the profit margin made by the taxable dealer, less the amount of value added tax relating to the profit margin. That profit margin shall be equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.

For the purposes of this paragraph, the following definitions shall apply:

— *selling price* shall mean everything which constitutes the consideration, which has been, or is to be, obtained by the taxable dealer from the purchaser or a third party, including subsidies directly linked to that transaction, taxes, duties, levies and charges and incidental expenses such as commission, packaging, transport and insurance costs charged by the taxable dealer to the purchaser but excluding the amounts referred to in Article 11 (A) (3),

— *purchase price* shall mean everything which constitutes the consideration defined in the first indent, obtained, or to be obtained, from the taxable dealer by his supplier.

4. Member States shall entitle taxable dealers to opt for application of the special arrangements to supplies of:

(a) works of art, collectors' items or antiques which they have imported themselves;

(b) works of art supplied to them by their creators or their successors in title;

(c) works of art supplied to them by a taxable person other than a taxable dealer where the supply by that other taxable person was subject to the reduced rate pursuant to Article 12 (3) (c).

Member States shall determine the detailed rules for exercising this option which shall in any event cover a period at least equal to two calendar years.

If the option is taken up, the taxable amount shall be determined in accordance with paragraph 3. For supplies of works of art, collectors' items or antiques which the taxable dealer has imported himself, the purchase price to be taken into account in calculating the margin shall be equal to the taxable amount on importation, determined in accordance with Article 11 (B), plus the value added tax due or paid on importation.

5. Where they are effected in the conditions laid down in Article 15, the supplies of second-hand goods, works of art, collectors' item or antiques subject to the special arrangements for taxing the margin shall be exempt.

6. Taxable persons shall not be entitled to deduct from the tax for which they are liable the value added tax due or paid in respect of goods which have been, or are to be, supplied to them by a taxable dealer, in so far as the supply of those goods by the taxable dealer is subject to the special arrangements for taxing the margin.

7. In so far as goods are used for the purpose of supplies by him subject to the special arrangements for taxing the margin, the taxable dealer shall not be entitled to deduct from the tax for which he is liable:

(a) the value added tax due or paid in respect of works af art, collectors' items or antiques which he has imported himself;

(b) the value added tax due or paid in respect of works of art which have been, or are to be, supplied to him by their creators or their successors in title;

(c) the value added tax due or paid in respect of works of art which have been, or are to be, supplied to him by a taxable person other than a taxable dealer.

8. Where he is led to apply both the normal arrangements for value added tax and the special arrangements for taxing the margin, the taxable dealer must follow separately in his accounts the transactions falling under each of these arrangements, according to rules laid down by the Member States,

9. The taxable dealer may not indicate separately on the invoices which he issues, or on any other document serving as an invoice, tax relating to supplies of goods which he makes subject to the special arrangements for taxing the margin.

10. In order to simplify the procedure for charging the tax and subject to the consultation provided for in Article 29, Member States may provide that, for certain transactions or for certain categories of taxable dealers, the taxable

amount of supplies of goods subject to the special arrangements for taxing the margin shall be determined for each tax period during which the taxable dealer must submit the return referred to in Article 22 (4).

In that event, the taxable amount for supplies of goods to which the same rate of value added tax is applied shall be the total margin made by the taxable dealer less the amount of value added tax relating to that margin.

The total margin shall be equal to the difference between:

— the total amount of supplies of goods subject to the special arrangements for taxing the margin effected by the taxable dealer during the period; that amount shall be equal to the total selling prices determined in accordance with paragraph 3,

and

— the total amount of purchases of goods as referred to in paragraph 2 effected, during that period, by the taxable dealer; that amount shall be equal to the total purchase prices determined in accordance with paragraph 3.

Member States shall take the necessary measures to ensure that the taxable persons concerned do not enjoy unjustfied advantages or sustain unjustified loss.

11. The taxable dealer may apply the normal value added tax arrangements to any supply covered by the special arrangements pursuant to paragraph 2 or 4.

Where the taxable dealer applies the normal value added tax arrangements to:

(a) the supply of a work of art, collectors' item or antique which he has imported himself, he shall be entitled to deduct from his tax liability the value added tax due or paid on the import of those goods;

(b) the supply of a work of art supplied to him by its creator or his successors in title, he shall be entitled to deduct from his tax liability the value added tax due or paid for the work of art supplied to him;

(c) the supply of a work of art supplied to him by a taxable person other than a taxable dealer, he shall be entitled to deduct from his tax liability the value added tax due or paid for the work of art supplied to him.

This right to deduct shall arise at the time when the tax due for the supply in respect of which the taxable dealer opts for application of the normal value added tax arrangements become chargeable.

C. *Special arrangements for sales by public auction*

1. By way of derogation from B, Member States may determine, in accordance with the following provisions, the taxable amount of supplies of second-hand goods, works of art, collectors' items or antiques effected by an organizer of sales by public auction, acting in his own name, pursuant to a contract under which commission is payable on the sale of those goods by public auction, on behalf of:

— a non-taxable person,

or

— another taxable person, in so far as the supply of goods, within the meaning of Article 5 (4) (c), by that other taxable person is exempt in accordance with Article 13 (B) (c),

or

— another taxable person, in so far as the supply of goods, within the meaning of Article 5 (4) (c), by that other taxable person qualifies for the exemption provided for in Article 24 and involves capital assets,

or

— a taxable dealer, in so far as the supply of goods, within the meaning of Article 5 (4) (c), by that other taxable dealer, is subject to tax in accordance with the special arrangements for taxing the margin provided for in B.

2. The taxable amount of each supply of goods referred to in paragraph 1 shall be the total amount invoiced in accordance with paragraph 4 to the purchaser by the organizer of the sale by public auction, less:

— the net amount paid or to be paid by the organizer of the sale by public auction to his principal, determined in accordance with paragraph 3,

and

— the amount of the tax due by the organizer of the sale by public auction in respect of his supply.

3. The net amount paid or to be paid by the organizer of the sale by public auction to his principal shall be equal to the difference between: