and its compatibility with Community law must be considered in the context of Article 95. Value-added tax constitutes internal taxation in excess of that imposed on similar domestic products within the meaning of Article 95 of the Treaty to the extent to which the residual part of the value-added tax paid in the Member State of exportation which is still contained in the value of the product on importation is not taken into account. The burden of proving facts which justify the taking into account of the tax falls on the importer.

2. Article 2, point 2, of the Sixth Council Directive No 77/388, according to which "the importation of goods" is to be subject to value-added tax, is compatible with the Treaty and therefore valid since it must be interpreted as not constituting an obstacle to the obligation under Article 95 of the Treaty to take into account, for the purpose of applying value-added tax on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported.

3. Article 95 of the Treaty prohibits Member States from imposing value-added tax on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, to the extent to which the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported is not taken into account.

In Case 15/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch, for a preliminary ruling in the action pending before that court between

GASTON SCHUL DOUANE EXPEDITEUR BV

and

INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN [Inspector of Customs and Excise], ROOSENDAAL,

on the interpretation of Articles 13 and 95 of the EEC Treaty and the validity of Article 2, point 2, 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 (Official Journal L 145, p. 1),

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Tuffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: S. Rozès
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. In the Netherlands the law on turnover tax of 1968 as amended in 1978 provides for turnover tax to be applied according to the system of value-added tax.

According to Article 1 of that law turnover tax means "a tax on:

(a) The supply of goods and services provided within the country by traders in the course of their business;

(b) The importation of goods."

According to Article 2 the trader is authorized to deduct from the tax for which he is liable on the supply of goods and provision of services the tax levied on the goods and services supplied to him and the tax on the importation of goods which are intended for him. According to Article 7 of the law "trader" means anyone engaged in an independent activity.

According to Articles 9 and 20 respectively the tax is fixed at the rate of 18% both for the supply of goods and services within the country and for imports.

It appears from the particulars given by the national court that turnover tax is not levied in the Netherlands on goods if the delivery is made within the country by a private person who is not a trader whereas if the goods are imported from a non-member country or from Member States the tax is in principle always levied whatever the status of the supplier and whether or not the goods are delivered.

2. The above-mentioned legislation was adopted to make the Netherlands tax system comply with the Community directives on the harmonization of the laws of the Member States relating to turnover taxes. Article 2 of the Sixth Council Directive No 77/388 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 L 145, p. 1) provides:

"The following shall be subject to value-added tax:

(1) The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

(2) The importation of goods."

Article 4 thereof provides as follows:

"1. 'Taxable person' shall mean any person who independently carries out in any place any economic activity specified in paragraph (2), whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph (1) shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity."

3. The main action is between a limited liability company Gaston Schul Douane Expediteur BV, customs forwarding agents, and Inspecteur der Invoerrechten en Accijnzen [Inspector of Customs and Excise], Roosendaal. Schul imported a second-hand pleasure and sports boat on the instructions and on behalf of a private person resident in the Netherlands who had bought it in Cannes from a private person resident in Monaco. The Inspector of Customs and Excise levied turnover tax on Schul in respect of the importation.

Schul lodged an objection with the Inspector against the turnover tax on importation claiming that the boat had already been subject to turnover tax within the Community, namely in France, and there had been no remission of tax on exportation. The Inspector, however, dismissed the objection on the ground the levy was made pursuant to the provisions of the Netherlands law on turnover tax.

The company Gaston Schul lodged an appeal against that decision before the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch. Its main contention is that the taxation is contrary to Article 13 and, as the case may be, Article 12 of the EEC Treaty. Although it is true that the tax in question is part of a general system of internal dues in force in the Netherlands applying systematically to

domestic and imported products, nevertheless it is not applied according to the same criteria or at the same marketing stage. Schul also observed that Article 95 of the EEC Treaty may also be relevant to the case.

The Gerechtshof, 's-Hertogenbosch, considered that a decision of the Court of Justice was necessary to enable it to give judgment and referred the following questions to the Court of Justice under Article 177 of the EEC Treaty:

"1. Must the charging by a Member State of turnover tax on the importation of goods from another Member State which are supplied by a private person be regarded as a charge having an effect equivalent to customs duties within the meaning of Article 13 (2) of the Treaty [establishing the European Economic Community] if, on the supply by a private person of goods which are already in that Member State, no charge to turnover tax is made?

2. If Question 1 is answered in the negative, then, within the meaning of Article 95 of the Treaty, must the charging by a Member State of turnover tax on the importation of goods from another Member State which are supplied by a private person be regarded as internal taxation in excess of that imposed on similar domestic products if no turnover tax is charged on the supply of goods which are already in that Member State if they are supplied by a private person?

3. Should one of the two foregoing questions be answered in the affirmative, must it be assumed that point 2 of Article 2 of the Sixth [Council] Directive on the harmonization of the laws of the Member States relating to turnover taxes is incompatible with the Treaty and therefore invalid in so far as that provision requires Member States to subject the importation of goods from other Member States to value-added tax without making any exception for goods supplied by private persons which, when supplied within the Member State concerned, would not be subject to that tax?

4. Does an affirmative answer to Question 3 mean that a Member State is prohibited from subjecting to value-added tax the importation of goods from another Member State supplied by a private person if the supply of those goods within the Member State by a private person is not subject to that tax?"

4. The judgment making the reference was received at the Court Registry on 13 January 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the limited liability company Gaston Schul, represented for that purpose by Barents, Gasille and Mout of the Bar of The Hague, by the Netherlands Government, represented by F. Italianer, acting for the Ministry for Foreign Affairs, by the Council of the European Communities, represented by Raffaello Fornasier, acting as Agent, and the Commission of the European Communities, represented by D. Gilmour, acting as Agent, assisted by T. van Rijn.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless invited the parties to the main action, the governments of the Member States and the Council and the Commission to explain before the hearing the reasons for the rules of the Sixth Directive providing for taxation on importation even if, as in the case of deliveries effected between private persons, there is no remission of tax on exportation, and of the compatibility of those rules with Article 95 and the general principles of the Treaty.

Answers were lodged by Gaston Schul, the Netherlands Government, the Italian Government, respresented for that purpose by Marcello Conti, Avvocato dello Stato, and by the Council and the Commission.

II — Written observations

The preliminary questions

1. The company *Gaston Schul* makes the preliminary point that the delivery of the boat in question to the previous owner had been subject in France to turnover tax and the previous owner did not obtain in relation to the export to the Netherlands a refund of the tax he had paid.

(a) As to the *first question*, Schul points out that according to the case-law of the Court the prohibition in Article 13 (2) of the Treaty in principle refers to all pecuniary charges unilaterally imposed, whatever they are called and whatever the manner of their imposition, payable on goods imported from another Member State when they cross the border. The only exemption from that prohibition is pecuniary charges which are part of a general system of internal taxation applying systematically in accordance with the same criteria and at the same marketing stage to domestic and imported products.

In the present case it is to be observed that although in the Netherlands the turnover tax levied on the imported boat comes under a "general system of internal taxation applied systematically ... to domestic products and imported products" within the meaning of the judgment of the Court of 28 June 1978 in Case 70/77 *Simmenthal* [1978] ECR 1453, this taxation is not applied according to the same criteria or at the same marketing stage. The criteria are different because domestic products are not subject to turnover tax where the sale is by a private person; the marketing stage is not the same because the tax is not levied on domestic products at the stage of delivery on sale by private persons.

Accordingly, the first question calls for the following answer:

"Turnover tax which a Member State levies on the importation of goods from another Member State which are supplied by a private person must be considered as a charge having effect equivalent to customs duties on imports within the meaning of Article 13 (2) of the Treaty if turnover tax is not levied on the supply by a private person of goods which are already in that Member State."

(b) As to the *second question* Schul points out that, according to the case-law of the Court, in applying Article 95 it is necessary to take into account, not only the rate of taxation, but also the provisions as to the basis of assessment and the conditions for the levying of the various taxes since the decisive criterion for comparison is the effective incidence of each tax on the domestic products on the one hand and imported products on the other.

The Netherlands legislation provides a different basis of assessment for the levying of the turnover tax in that domestic products are liable to the tax only when the supply is effected for a consideration to the taxable person whereas imported products are liable simply by reason of their importation. That difference has a real effect upon domestic and imported products for even if the rate is the same the charge is different in view of the fact that the basis of assessment for the imported product includes the turnover tax paid in another Member State.

As a result, the second question, submitted in the event of the first question's being answered in the negative, calls for the following answer:

"Turnover tax which a Member State levies on the importation of goods from another Member State supplied by a private person must be considered as internal taxation in excess of that imposed on similar domestic products and falling within Article 95 of the Treaty if no turnover tax is levied on the supply by a private person of goods already in that Member State."

(c) As regards the *third question* Article 2, point 2, of the Sixth Directive, instead of encouraging the free movement of goods, constitutes an obstacle thereto which may be assimilated to a charge having equivalent effect. That provision is invalid in so far as either it provides no exemption on importation where the supply is by private persons or fails to avoid double taxation in some other way, for example by providing that upon exportation from another Member State the turnover tax levied in that other Member State will be refunded in whole or in part.

Consequently the third question calls for the following answer:

"Article 2, point 2, of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes is incompatible with the Treaty and therefore invalid in so far as that provision requires Member States to subject the importation of goods from other Member States to value-added tax:

Either without making any exception for goods supplied by private persons which, if supplied within the Member State concerned, would not be subject to that tax;

or without taking other measures to avoid double taxation on the movement between Member States of goods belonging to private persons."

(d) As to the *fourth question* it is contended that in so far as Article 2, point 2, of the Sixth Directive is invalid it cannot affect the obligations on Member States under Articles 13 and 95 of the Treaty.

As a result the answer to the *fourth question* is as follows:

"The answer to the third question implies that in the present state of Community law a Member State is not permitted to charge value-added tax on the importation of goods from another Member State supplied by a private person if the supply of those goods by a private person within the Member State is not subject to that tax."

2. The *Netherlands Government* observes that Article 1 of the Netherlands law on turnover tax complies with Article 2 of the Sixth Directive. That directive aims at the partial harmonization of national laws on turnover taxes in accordance with the objectives of the EEC Treaty.

That harmonization is necessary because the laws of the Member States on turnover taxes are based on the principle that consumer taxes, such as turnover tax, must be levied in the country where the goods and services in question are used (principle of the country of destination). Implementation of that principle implies that there are tax frontiers, as the consumption of goods in a Member State is liable to the turnover tax in force in that Member State. The tax thus affects not only the supply of goods which traders make within the country but also the importation of goods, irrespective of the person who carries out the importation and of the nature of the transaction at the basis of that importation.

(a) As to the *first question* the Netherlands Government considers that the levying of turnover tax on the importation of goods from another Member State by a private person does not constitute a charge having equivalent effect within the meaning of Article 13 (2) of the Treaty.

That provision is aimed, as the Court held in the judgment of 19 June 1973 in Case 77/72 *Capolongo* [1973] ECR 611, at any tax demanded at the time of or by reason of importation and which, being imposed specifically on an imported product, results in the same restrictive consequences on the free movement of goods as a customs duty by altering the cost price of that product. On the other hand, it follows from that judgment that pecuniary charges such as turnover tax, which fall within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria, are not to be considered as charges having equivalent effect.

The taxation of goods supplied by undertakings within the country is a tax liability which is imposed on those goods before they reach the consumer and which subsequently affects the completed use or consumption. It is therefore unnecessary also to subject to turnover tax any supplies by private persons at a subsequent stage in view of the fact that the completed use is taxed, as the undertaking paid turnover tax on the price of the goods in their new state when it supplied them to the first private person. Further, if there were no such taxation on importation there would be inequality in relation to the position in which the same private person would be if he had acquired the same goods in the Member State. It is precisely in order to avoid such an advantage that the importation of goods is always in principle subject to the national tax.

(b) The *second question* also calls for a negative answer. On the importation of goods the consumption of which has already started outside the territory of the Netherlands the taxation relates to the agreed sale price or the market price which may be regarded as representing the value of the goods having regard to what scope for consumption is left in them. Thus, applying the tax to the sale or market price and taking as a basis what use is left in the goods, a situation is reached which is equivalent from the tax point of view, to that of goods which are already in the country at the same marketing stage or which have been resold after a corresponding partial consumption. It follows that the levying of turnover tax on the importation of products by private persons cannot be regarded as internal taxation in excess of that imposed on similar domestic products within the meaning of Article 95 of the Treaty.

(c) Having regard to the negative answer to be given to the first two questions the *third and fourth questions* are redundant.

3. The observations of the *Council*, which gives its opinion only on the *third question* in relation to the validity of the Sixth Directive, may be summarized as follows:

(a) The object of the *Sixth Directive* is to establish a common system of value-added tax. It does not however establish a comprehensive system containing all the detailed provisions enabling it to be applied in a uniform manner in all the Member States but harmonizes the national tax systems only partially so that the Member States retain a wide discretion as regards determining the rates of the tax and the definition of the concepts used for the purpose of applying the tax. It is aimed above all at the economic activities of traders but extends also to all transactions, even those of a non-commercial kind.

That harmonization is based on the one hand on the maintenance of tax frontiers, that is to say, the compartmentalization of the tax systems of the Member States, and on the other hand on a gradual standardization of those systems. In the meantime the differences between the national systems are equalized at the frontier by a system of taxation on importation and remission on exportation. The compensatory system is, however, imperfect in so far as the differences between the laws which have not yet been harmonized may give rise to taxation for which there is no remission.

As regards more particularly Article 2 of the Sixth Directive Member States are required, in respect of transactions effected within the country, to levy value-added tax only on transactions effected by a taxable person within the meaning of Article 4 of the directive. That article leaves a wide discretion to the Member States, especially as regards occasional transactions. On the other hand as regards imports Member States are bound to levy value-added tax on all imports of goods and have no discretion in the matter.

To avoid double taxation of goods, namely in the country of export and in the country of import, Article 15, point 1, of the directive requires the exporting

Member State to exempt the supply of goods dispatched or transported outside the national territory by or on behalf of the vendor. Consequently in the normal run of cases and in any event in commercial transactions there is no double taxation but simply payment of value-added tax in the country of import. It may however be that in the case of transactions not involving taxable persons the juxtaposition of national systems which are only partially harmonized may give rise to taxation on importation without there being remission on exportation.

(b) The Council maintains that the system thus described is *compatible with the provisions of the EEC Treaty*. To that end it analyses Articles 95, 12 and 13 of the Treaty.

Article 95 of the Treaty is not affected by Article 2 of the directive since that provision does not impose a general prohibition on the levying of taxes on importation but only the levying of taxes which are in excess of those imposed on similar domestic products.

The requirement that Member States levy tax on importation with no corresponding remission on exportation does not fall within the scope of Articles 12 or 13 for the threefold reason that such taxation is marginal, because it can occur only in rare cases of disparity between the national systems, that it is transitional, because it coincides with a stage of partial harmonization of the national systems, and that it is indispensable to the functioning of the system. If transactions between private persons had to be treated in the same way whether they were made within the country or across the frontier, the tax frontiers would lose their effectiveness since it would be sufficient for a private person, wishing to buy goods at a lower rate of value-added tax in another Member State, to have them bought by another private person and forwarded to him.

(c) Consequently the Council proposes that the Court should answer the *third question* to the effect that the obligation placed on Member States by Article 2 of the Sixth Directive to levy value-added tax on the importation of goods, even when bought from private persons, does not infringe Article 95 of the Treaty. Nor, because of its object, can it be considered as involving the imposition of a charge having an effect equivalent to a customs duty within the meaning of Articles 12 and 13 of the Treaty. In any event it should be accepted as a transitional provision, inasmuch as it is a necessary means of progressively achieving the harmonization of taxes and avoiding the abuses which might otherwise arise from the partial nature of that harmonization.

4. The *Commission* recognizes that the Netherlands system of value-added tax constitutes an obstacle to the free movement of goods since the sale of second-hand goods between private persons in the Netherlands is not subject to value-added tax whereas goods bought in similar circumstances in another Member State and imported into the Netherlands are subject to the tax. It nevertheless maintains that neither the

Sixth Directive nor the levying of the tax in question is incompatible with the Treaty. In that respect it first of all considers the compatibility of the Netherlands system with the directive and then the compatibility of the directive with Articles 13 and 95 of the Treaty.

(a) As regards the question of the *compatibility of the Netherlands system with the Sixth Directive* it is necessary to start with the mechanics of the tax. It is levied at each production and distribution stage up to the ultimate consumer so that each taxable person in the marketing chain is bound to collect and pay it to the Treasury after deducting the amount paid to the taxable person immediately prior to him in the chain. The tax is levied according to the same criteria and methods within each fiscal jurisdiction, the Member States nevertheless remaining free to determine their own rates of levy. No value-added tax is required in the event of sale by private persons in so far as the sale takes place within the fiscal jurisdiction of a Member State, since private persons are not taxable persons within the meaning of the directive.

Article 15 of the directive provides a right of exemption from the tax in the event of exportation. According to Article 12 (5) of the directive goods so exported are subject on entry into another Member State to the value-added tax of that State at the same rate as that applied to the supply of like goods within the territory of the country.

Nevertheless Article 32 contains special provisions for second-hand goods in respect of which the Council ought to have adopted before 31 December 1977 a Community taxation system. According to that article Member States applying a special system to second-hand goods at the time the directive came into force could retain their system until the Community system became applicable.

It follows that although there is undoubtedly a right of deduction on the export of new goods, so that the question of double taxation does not arise, the directive is not clear with regard to second-hand goods imported by a private person after being acquired from another private person. In that respect the Commission first of all discusses the scope of Article 32, which concerns the sale of second-hand goods, and according to which Member States are authorized to retain their system in force until the Community system applies. The Commission takes the view that that provision applies only to taxable persons and concludes that the sale in a Member State of second-hand goods between private persons does not fall within the system of the Sixth Directive and is not liable to tax.

The Commission then expounds the argument according to which value-added tax may be levied on the importation of second-hand goods by a private person when those goods have been acquired through another private person. That argument may be based on the clear words of Article 2, point 2, of the directive which provides that imports of goods are subject to value-added tax. The obligation so created is of an absolute nature, as is confirmed, moreover, by other provisions of the directive which make the same distinction between transactions

concluded within the country and imports.

That argument cannot be refuted by the objection that the system so described gives rise to double taxation regarding second-hand goods which have already been subject to the tax once at the ultimate consumer stage, for double taxation is not made unlawful by the Sixth Directive which has not succeeded in neutralizing value-added tax in intra-Community trade in respect of all classes of transactions.

The Commission adds that a second interpretation would be possible to which however it does not subscribe. That argument assumes that the establishment of the value-added tax system is intended to ensure that the levying of the tax is neutral as regards competition either at the national or Community level. Thus Article 10 of the directive treats as intrinsically equivalent the chargeable event on the domestic level, namely delivery of the goods, and the chargeable event on importation, namely when the goods enter the country, in the same way as Article 12 (5) of the directive provides that "the rate applicable on the importation of goods shall be that applied to the supply of like goods within the territory of the country". In the present case it may be considered that there is neither equivalence with the chargeable event nor, *a fortiori*, with the rate applicable on importation, since on the domestic market the equivalent transaction, namely the sale between private persons, does not give rise to the levy of any tax.

It must, however, be objected to that interpretation that the key words of Article 12 (5) of the directive are "the supply of like goods" whereas in the foregoing argument those words are interpreted as meaning an equivalent transaction, that is to say, the delivery of second-hand goods on behalf of a private person to another. In addition it must be objected that the price demanded for second-hand goods reflects the value-added tax originally imposed and that it is therefore necessay to compensate for the tax which is reflected in the price of second-hand goods on the domestic market.

Consequently the Commission concludes that a tax levied on the importation of second-hand goods acquired by private persons as the result of a transaction with other private persons is compatible with the Sixth Directive.

(b) As regards the compatibility of the Sixth Directive with the provisions of the Treaty the Commission takes the view that levies made under the system of value-added tax cannot be regarded, in the light of the case-law of the Court, as falling under Article 13 (2) but must be considered with regard to Article 95. The tax in question is part of the system of value-added tax which is a domestic consumer tax applicable throughout the Community on the basis of the same criteria.

The Court considered in its judgment of 31 May 1979 in Case 132/78 *Denkavit* [1979] ECR 1923 that in order to come under a general system of internal dues the charge "must impose the same duty on national products and identical imported products at the same marketing

stage and the chargeable event giving rise to the duty must also be identical in the case of both products". Nevertheless it is doubtful whether that consideration is applicable in the present case since the judgment in *Denkavit* was concerned with a system of parafiscal charges relating to the protection of public health, which is not comparable with the taxation in question.

Therefore assuming that it is Article 95 and not Article 13 of the Treaty which is applicable in the present case, the principle question is whether the levying of the tax is discriminatory. The answer to that question is in the negative.

Article 95 allows all taxation directly or indirectly affecting similar national products to be compensated for at each stage of their existence. The sale of second-hand goods by private persons is indirectly subject to internal taxation within the meaning of Article 95 (1) since the tax demanded on the supply of new goods by taxable persons on the domestic market is reflected in the market price of the second-hand goods in proportion to the tax element included therein. Consequently, the tax levied on importation rightly compensates for the tax levied on the product in its new state.

(c) In conclusion the Commission proposes that the Court should answer the questions referred to it to the effect that value-added tax levied by the Netherlands on the importation by a private person of second-hand goods acquired as the result of a transaction with another private person is not to be considered as a charge having an effect equivalent to customs duties, but is part of a system of internal taxation. That tax is not discriminatory and therefore is compatible with Article 95 of the Treaty since the same tax as that on importation indirectly affects products consumed within the country.

The questions relating to the validity of the Sixth Directive are therefore redundant.

The questions put by the Court

1. The reasons for and consequences of the rules

(a) In the opinion of the company *Gaston Schul* the rules in the Sixth Directive under which turnover tax is levied on importations even on supplies by private persons whereas exemption on export applies only to supplies by taxable persons, are the result of oversight rather than deliberate intention. It is quite possible to provide for private persons exporting goods a right to the refund of the tax subject to evidence that the goods have been charged on importation into another Member State.

(b) The *Netherlands* and *Italian Governments* and the *Council* and the *Commission* agree in maintaining that the double taxation to which the Sixth Directive leads in the case of supplies between private persons is a corollary of the merely partial harmonization which has been achieved in this matter and which allows tax frontiers to continue to exist.

The *Netherlands Government* adds that the number and importance of cases of double taxation are very limited. The adoption of rules preventing all forms of double taxation would involve

complications of a legislative and practical nature which would perhaps be out of reasonable proportion to the financial and economic interests involved.

The *Italian Government* states that whereas the taxation of imported goods is necessary in any event to achieve neutrality in competition in intra-Community trade, any refund to the ultimate consumer of the tax paid previously would give the latter an unjustified benefit which would encourage him to export.

2. The compatibility with the spirit of Article 95 and with the general principles of Community law

(a) The company *Gaston Schul* considers that rules which result in a difference in treatment according to whether a private person buys goods from another private person established in the same State or in another Member State is contrary to both the rule against non-discrimination contained in Article 95 and the prohibition on charges having equivalent effect. It is also incompatible with the objective of harmonization which is to ensure within the Community similar conditions to those existing in a national market.

(b) The *Netherlands* and *Italian Governments* and the *Council* and the *Commission* consider that it is not contrary to the spirit of Article 95 or to the general principles of Community law to tax goods on importation even though there is no remission on exportation.

The *Netherlands Government* adds that Article 95 does not affect taxation prescribed by Community rules applying in the same form to all Member States and not thereby favouring the national production of one Member State to the detriment of that of others. The general principles of Community law and in particular the principle of equality of treatment do not impose a general prohibition on double taxation.

The *Italian Government* states that an unjustifiably privileged position would arise if private persons supplying second-hand goods abroad were entitled to a refund of value-added tax whereas the private consumer reselling the goods within the country would not be so entitled.

In the *Commission's* opinion the fact that supplies by private persons across frontiers are charged more heavily than the same supplies within the territory of a Member State is certainly a weakness in the system but is not as such unlawful. The problem of double taxation which moreover also arises in the field of excise duties on alcoholic beverages, tobacco and petroleum products must be solved by the harmonization of tax laws.

III — Oral procedure

At the sitting on 14 October 1981 the limited liability company, Gaston Schul, represented by W. Alexander, of The Hague Bar, the French Government, represented by A. Carnelutti, the Italian Government, represented by Mr Conti,

the Council of the European Communities, represented by R. Fornasier, assisted by A. Brautigam, and the Commission of the European Communities represented by D. Gilmour, T. van Rijn and G. Romoli Venturi, presented oral argument and answered questions put by the Court.

The Advocate General delivered her opinion at the sitting on 16 December 1981.

Decision

1 By judgment of 19 December 1980, received at the Court on 30 January 1981, the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch, referred four questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Articles 13 and 95 of the EEC Treaty and the validity of Article 2, point 2, of the Sixth Council Directive No 77/388 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 L 145, p. 1).

2 The limited liability company Gaston Schul Douane Expéditeur BV, customs forwarding agents, imported a second-hand pleasure and sports boat into the Netherlands on the instructions and on behalf of a private person residing in the Netherlands who had bought it in France from another private person. The Netherlands revenue authority levied on that importation value-added tax at the rate of 18% on the sale price which was the normal rate applied within the country on the sale of goods for valuable consideration. The levying of that tax is the subject of the main action.

3 The Netherlands authority relied on the Netherlands law of 1968 on turnover tax and in particular Article 1 thereof. According to that provision turnover tax is chargeable on the one hand on goods delivered and services provided within the country by traders in the course of their business and on the other hand on the importation of goods. The provision gives effect to Article 2 of the Second Council Directive No 67/228 of 11 April 1967 on the

harmonization of legislation of Member States concerning turnover taxes — structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16), an article whose provisions were substantially incorporated into the above-mentioned Article 2 of the Sixth Council Directive No 77/388 af 17 May 1977.

4 When the objection to that decision was dismissed on the ground that the tax had been levied in conformity with the Netherlands legislation the company Gaston Schul brought the matter before the Gerechtshof, 's-Hertogenbosch. It claims that the tax is contrary to the provisions of the EEC Treaty, in particular Articles 12 and 13 on the one hand and Article 95 on the other.

5 In order to be able to assess that submission the Gerechtshof referred to the Court the following questions for a preliminary ruling:

"1. Must the charging by a Member State of turnover tax on the importation of goods from another Member State which are supplied by a private person be regarded as a charge having an effect equivalent to customs duties within the meaning of Article 13 (2) of the Treaty [establishing the European Economic Community] if, on the supply by a private person of goods which are already in that Member State, no charge to turnover tax is made?

2. If Question 1 is answered in the negative, then, within the meaning of Article 95 of the Treaty, must the charging by a Member State of turnover tax on the importation of goods from another Member State which are supplied by a private person be regarded as internal taxation in excess of that imposed on similar domestic products if no turnover tax is charged on the supply of goods which are already in that Member State if they are supplied by a private person?

3. Should one of the two foregoing questions be answered in the affirmative, must it be assumed that point 2 of Article 2 of the Sixth [Council] Directive on the harmonization of the laws of the Member States relating to turnover taxes is incompatible with the Treaty and therefore invalid in so far as that provision requires Member States to subject the importation of goods from other Member States to value-added tax without making any exception for goods supplied by private persons

which, when supplied within the Member State concerned, would not be subject to that tax?

4. Does an affirmative answer to Question 3 mean that a Member State is prohibited from subjecting to value-added tax the importation of goods from another Member State supplied by a private person if the supply of those goods within the Member State by a private person is not subject to that tax?"

6 The questions put by the national court are essentially aimed at ascertaining whether it is compatible with the provisions of the Treaty, and in particular with Articles 12 and 13 on the one hand and 95 on the other, for a Member State to levy, pursuant to Community directives, turnover tax in the form of value-added tax on the importation of products from another Member State supplied by a non-taxable person (hereinafter referred to as a "private person").

7 The plaintiff in the main action alleges that the tax is incompatible with the Treaty because similar supplies within the territory of a Member State by a private person are not subject to value-added tax. It maintains further that the levying of value-added tax on the importation of products from another Member State supplied by a private person gives rise to an overlapping of taxes since, unlike supplies made by taxable persons, there is no remission in respect of value-added tax levied in the Member State of exportation. Consequently, the value-added tax levied on the importation of such products must be considered as a charge having an effect equivalent to a customs duty or as discriminatory internal taxation.

The common system of value-added tax

8 In order to evaluate the content of those arguments and to supply the factors required for an answer to the questions put to the Court it is necessary to record briefly the characteristics, relevant in this case, of the system of turnover tax in the form of the common system of value-added tax.

9 The common system was established on the basis of Articles 99 and 100 of the Treaty by the First Council Directive No 67/227 of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (Official Journal, English Special Edition 1967, p. 14). It was supplemented by the Second Council Directive No 67/228 of the same date which in turn was replaced by the Sixth Council Directive No 77/388 of 17 May mentioned above.

10 By virtue of Article 2 of the First Directive the principle of the common system of value-added tax consists in the application to goods and services up to and including the retail stage of a general 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. However, value-added tax is chargeable on each transaction only after deduction of the amount of value-added tax borne directly by the cost of the various price components. The procedure for deduction is so arranged by Article 17 (2) of the Sixth Directive that only taxable persons are authorized to deduct from the value-added tax for which they are liable the value-added tax which the goods have already borne.

11 That is the background to Article 2 of the Sixth Directive which provides that the following are to be subject to value-added tax: on the one hand "the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such" (point 1) and on the other "the importation of goods" (point 2). Article 4 of the directive defines "taxable person" as meaning any person who independently carries out in any place any economic activity such as that of producer, trader, and person supplying services including mining and agricultural activites and activities of the professions. Article 5 defines "supply of goods" as "the transfer of the right to dispose of tangible property as owner" whereas "importation of goods" is defined in Articles 7 as "the entry of goods into the territory of the country".

12 The Sixth Directive also harmonizes the concepts of chargeable event and chargeability of tax (Article 10) and the taxable amount (Article 11).

Exemptions are provided both for transactions within the country and imports (Articles 13 and 14). Exports and like transactions are exempted from tax (Article 15).

13 It is right to stress that the directives bring about only a partial harmonization of the system of value-added tax. At the present stage of Community law Member States are free *inter alia* to fix the rate of value-added tax, provided always that the rate applicable on the importation of goods must be that applied to the supply of like goods within the territory of the country (Article 12 of the Sixth Directive).

14 It may be concluded from an analysis of the characteristics of the common system of value-added tax, as set out above, on the one hand that, as regards transactions within a Member State the chargeable event is constituted by the supply of goods for valuable consideration by a taxable person acting as such whereas as regards imports the chargeable event is constituted by the mere entry of the goods into the territory of a Member State whether or not there is a transaction, and irrespective of whether the transaction is carried out for valuable consideration or free of charge, be it by a taxable person or a private person.

15 It follows further that although deliveries for export are themselves exempt from value-added tax, whether carried out by taxable persons or private persons, only taxable persons are authorized to exercise the right to deduct. As a result, only goods delivered for export by taxable persons or on their behalf may be exempted from all value-added tax applied in the country of exportation, whereas goods delivered for export by private persons remain liable to value-added tax to the extent proportionate to their value at the time of export. Since all imports are subject to value-added tax in the importing country there is in such a case an overlapping of taxes both of the State of exportation and the State of importation.

16 The preliminary questions must be considered on the basis of those aspects of the common system.

The first question: the interpretation of Articles 12 and 13 of the Treaty

17 The first question which the Gerechtshof submits is essentially whether it is compatible with Articles 12 and 13 of the Treaty to levy value-added tax on the importation of products from another Member State supplied by a private person if no such tax is levied on the supply of similar goods by a private person within the territory of the importing Member State.

18 According to established case-law of the Court the prohibition, in relations between Member States, of charges having an effect equivalent to customs duties, covers any tax which is payable on or by reason of importation and which, as it applies specifically to an imported product to the exclusion of a similar domestic product, ultimately produces, by adversely affecting the cost price of the former product, the same effect upon the free movement of goods as a customs duty.

19 The essential characteristic of a charge having an effect equivalent to a customs duty, and the one which distinguishes it from internal taxation, is therefore that it affects only imported products as such whereas internal taxation affects both imported products and domestic products.

20 The Court has nevertheless recognized that a pecuniary charge payable on a product imported from another Member State and not on an identical or similar domestic product does not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty if it is part of a general system of internal dues applicable systematically to categories of products according to objective criteria applied without regard to the origin of the products.

21 It is apparent from those considerations that a tax of the kind referred to by the national court does not have the ingredients of a charge having an effect equivalent to customs duties on imports within the meaning of Articles 12 and 13 (2) of the Treaty. Such a tax is part of the system of value-added tax the structure of which, and the essential terms governing its application, have been laid down by the Council in harmonizing directives. Those directives

have established a uniform taxation procedure covering systematically and according to objective criteria both transactions carried out within the territory of the Member States and import transactions. It should be pointed out in particular in that respect that the common system makes imports and supplies of like goods within the territory of a Member State subject to the same rate of tax. As a result the tax in question must be considered as an integral part of a general system of internal taxation for the purposes of Article 95 of the Treaty and its compatibility with Community law must be considered in the context of that article and not of that of Articles 12 et seq. of the Treaty.

22 The first question must therefore be answered to the effect that value-added tax which a Member State levies on the importation of products from another Member State supplied by a private person, where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, does not constitute a charge having an effect equivalent to a customs duty on imports within the meaning of Articles 12 and 13 (2) of the Treaty.

Second question: the interpretation of Article 95 of the Treaty

23 In its second question the Gerechtshof asks in substance whether the levying of value-added tax on the importation of products from another Member State supplied by a private person is compatible with Article 95 of the Treaty where no such tax is payable on the supply of similar products by a private person within the territory of the Member State of importation.

24 The plaintiff in the main action considers that such difference in treatment is contrary to Article 95 since on the one hand it is detrimental to the supply of products between private persons resident in different Member States as compared to supply by private persons resident in the Member State of importation and on the other hand it gives rise to an overlapping of taxes as regards products delivered by private persons across the frontier for which, unlike products supplied by taxable persons, there is no remission of tax on exportation.

25 The Member States which have taken part in these proceedings, the Council and Commission contend that the elimination of the overlapping of taxes

within the Community, however desirable it may be, can be achieved only by means of the gradual harmonization of the national taxation systems under Article 99 or 100 of the Treaty and not by applying Article 95. In support of that argument it was alleged that the overlapping of taxes is a corollary of the fact that the Treaty, by reserving power in relation to internal taxation to the Member States, has allowed tax frontiers to remain.

26 Under the system of the Treaty the purpose of the provisions of Article 95 in conjunction with the provisions on the abolition of customs duties and charges having equivalent effect is to ensure free movement of goods within the Community under normal conditions of competition by eliminating all forms of protection which may arise from the application of discriminatory internal taxation against products from other Member States.

27 Article 95 of the Treaty is essentially based on a comparison of the internal taxation applicable to imported products with that directly or indirectly applicable to similar domestic products. For the correct application of that article it is necessary to compare these products from the taxation point of view taking into account at each production or marketing stage the rate of tax, its basis of assessment and the procedures for levying it.

28 Article 95 does not prevent value-added tax from being chargeable on the importation of a product where the supply of a similar product within the territory of the country is also chargeable to that tax. It is accordingly necessary to consider whether the importation of a product may be liable to value-added tax where the supply of a similar product within the territory of the country, in the present case supply by a private person, is not so liable.

29 In that respect the Member States which have taken part in the proceedings, the Council and the Commission maintain that value-added tax may be chargeable upon imports provided that the rate of the value-added tax, its basis of assessment and the procedures for levying it are the same as those for the supply of a similar product by a taxable person within the territory of that Member State. They contend that the taxation simply places the imported products in the same position as similar domestic products with

regard to the tax burdens borne by the two categories. The domestic products have already been subjected to value-added tax within the territory of the Member State when delivered new. Since that tax is reflected in the market price of second-hand goods the effect of value-added tax charged on importation is merely to compensate for the residue of that tax and thus to establish, from the point of view of perfect neutrality with regard to intra-Community trade, equality of treatment between the domestic and foreign products.

30 On the other hand the plaintiff in the main action claims that there is a breach of the principle of equal treatment since the products imported by private persons are already burdened with value-added tax imposed in the Member State of exportation, there being no remission of tax on exportation.

31 It may be observed that at the present stage of Community law the Member States are free, by virtue of Article 95, to charge the same amount on the importation of products as the value-added tax which they charge on similar domestic products. Nevertheless, this compensation is justified only in so far as the imported products are not already burdened with value-added tax in the Member State of exportation since otherwise the tax on importation would in fact be an additional charge burdening imported products more heavily than similar domestic products.

32 That view derives in the first place from the terms of Article 95 of the Treaty which prohibits not only the direct but also the indirect imposition of internal taxation on products from other Member States in excess of that on similar domestic products. That prohibition would not be complied with if imported products could be subject to the value-added tax applicable to similar domestic products without account being taken of the proportion of value-added tax with which those products are still burdened at the time of their importation.

33 Such an interpretation accords with the need to take account of the objectives of the Treaty which are laid down in Articles 2 and 3 among which appears, in the first place, the establishment of a common market. The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about

conditions as close as possible to those of a genuine internal market. It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market.

34 Consequently, it is necessary also to take into account the value-added tax levied in the Member State of exportation for the purpose of determining the compatibility with the requirements of Article 95 of a charge to value-added tax on products from another Member State supplied by private persons where the supply of similar products within the territory of the Member State of importation is not so liable. Accordingly, in so far as such an imported product supplied by a private person may not lawfully benefit from a remission of tax on exportation and so remains burdened upon importation with part of the value-added tax paid in the Member State of exportation the amount of value-added tax payable on importation must be reduced by the residual part of the value-added tax of the Member State of exportation which is still contained in the value of the product when it is imported. The amount of this reduction may not, however, be greater than the amount of value-added tax actually paid in the Member State of exportation.

35 The Member States which have taken part in these proceedings have objected to this interpretation on the ground that the value-added tax paid in the Member State of exportation is difficult to check since both the rate of the tax and its basis of assessment may have varied in the course of time.

36 In that regard it should be pointed out that it is for the person who seeks exemption from or a reduction in the value-added tax normally levied on importation to establish that he satisfies the conditions for such exemption or reduction. Accordingly it is open to the Member State of importation to require such an importer to provide the necessary documentary proof that the value-added tax was levied in the Member State of exportation and still burdens the product on importation.

37 Further, the Member States maintained that the establishment of a system ensuring the complete neutrality of internal taxation with regard to intra-Community trade could take place only by strict application of the principle of taxation in the Member State of destination and that would mean full remission of tax on all products at the time of exportation. It is for the political institutions of the Community to adopt such a solution since it involves a political choice.

38 Nevertheless although the establishment of a system of complete neutrality in the field of competition involving full remission of tax on exportation is indeed a matter for the Community legislature, so long as such a system is not established Article 95 of the Treaty prevents an importing Member State from applying its system of value-added tax to imported products in a manner contrary to the principles embodied in that article.

39 Finally, it is also necessary to dismiss the objections based on possible difficulties of a technical and administrative nature which may result from taking into account the value-added tax of the Member State of exportation and those based on the need to prevent fraudulent circumventions and distortions in competition within the Community. The first category of objections must be dismissed since it is for the individual who seeks to claim the benefit of exemption from or reduction in value-added tax on importation to provide proof that the conditions are satisfied. The second category of objections is irrelevant since the levying of the differential amount of value-added tax removes any incentive to deflect trade.

40 The *second question* must accordingly be answered to the effect that value-added tax which a Member State levies on the importation of products from another Member State supplied by a private person, where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, constitutes internal taxation in excess of that imposed on similar domestic products within the meaning of Article 95 of the Treaty, to the extent to which the residual part of the value-added tax paid in the Member State of exportation which is still contained in the value of the product on importation is not taken into account. The burden of proving facts which justify the taking into account of the tax falls on the importer.

Third question: the validity of Article 2, point 2, of the Sixth Directive

41 The third question concerns the validity of Article 2, point 2, of the Sixth Directive in so far as it imposes value-added tax on products imported from another Member State and supplied by a private person.

42 The requirements of Article 95 of the Treaty are of a mandatory nature and do not allow derogation by any measure adopted by an institution of the Community. Nevertheless it follows from the foregoing considerations that that article does not prohibit in a general way the imposition of value-added tax on the importation of products even though the supply of similar domestic products in the territory of the Member State of importation is not so subject but it simply requires that the part of the value-added tax paid in the Member State of exportation and still burdening the product on import should be taken into account.

43 Consequently, there are no grounds for considering Article 2, point 2, of the Sixth Directive, according to which "the importation of goods" is to be subject to value-added tax, to be invalid. It is simply necessary to define the scope of that provision and interpret it in a manner consistent with the requirements of the Treaty as indicated above.

44 The *third question* must therefore be answered to the effect that Article 2, point 2, of the Sixth Council Directive No 77/388 of 17 May 1977 is compatible with the Treaty and therefore valid since it must be interpreted as not constituting an obstacle to the obligation under Article 95 of the Treaty to take into account, for the purpose of applying value-added tax to imports of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, the residual part of the value-added tax paid in the Member State of exportation contained in the value of the product when it is imported.

Fourth question: the direct effect of Article 95 of the Treaty

45 According to its wording the fourth question is concerned only with the consequences arising should Article 2, point 2, of the Sixth Directive be held to be invalid. However, it is apparent from an analysis of the question, especially in the light of the answers given to the first three questions, that the national court is essentially referring to the direct effect of Article 95 of the Treaty and the consequences of that effect on national laws and on the terms of their application.

46 According to established case-law of the Court that provision contains a prohibition of discrimination which constitutes a clear and wholly unconditional obligation and its implementation and effects are not subject to the adoption of any measure by the institutions of the Community or the Member States. The prohibition thus produces direct effects and creates for individuals personal rights which the national courts are bound to protect.

47 Consequently in so far as that provision, as interpreted by the Court, restricts the conditions under which value-added tax may be imposed on the importation of products from another Member State supplied by a private person, the Member States are bound to comply therewith and not to apply any provision to the contrary which may be contained in their national law.

48 The *fourth question* must therefore be answered to the effect that Article 95 of the Treaty prohibits Member States from imposing value-added tax on the importation of products from other Member States supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, to the extent to which the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported is not taken into account.

Costs

The costs incurred by the Netherlands, French and Italian Governments and by the Council and Commission, which have submitted observations to the Court, are not recoverable. Since the 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.

On those grounds,

THE COURT

in answer to the questions referred to it by the Gerechtshof, 's-Hertogenbosch by judgment of 19 December 1980, hereby rules:

1. Value-added tax which a Member State levies on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation does not constitute a charge having an effect equivalent to a customs duty on imports within the meaning of Articles 12 and 13 (2) of the Treaty.

2. Value-added tax which a Member State levies on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation constitutes internal taxation in excess of that imposed on similar domestic products within the meaning of Article 95 of the Treaty, to the extent to which the residual part of the value-added tax paid in the Member State of exportation which is still contained in the value of the product on importation is not taken into account. The burden of proving facts which justify the taking into account of the tax falls on the importer.

3. Article 2, point 2, of the Sixth Council Directive No 77/388 of 17 May 1977 is compatible with the Treaty and therefore valid since it must be interpreted as not constituting an obstacle to the obligation under Article 95 of the Treaty to take into account, for the purpose of applying value-added tax on the importation of products from another Member State supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported.

4. Article 95 of the Treaty prohibits Member States from imposing value-added tax on the importation of products from other Member States supplied by a private person where no such tax is levied on the supply of similar products by a private person within the territory of the Member State of importation, to the extent to which the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported is not taken into account.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 5 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 16 DECEMBER 1981 [1]

Mr President,
Members of the Court,

The Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch, has referred to the Court for a preliminary ruling under Article 177 of the Treaty of Rome a number of questions concerning turnover tax on the importation of goods delivered by private persons within the country or across a frontier.

The facts are as follows:

By contract made in Cannes in 1978 or at the beginning of 1979 Giovanni Nanni, a Swedish national, residing in Monaco, sold for the sum of FF 365 000 cash to Han Van Zanten, a Netherlands national, residing in Vuren (Netherlands), a Nautor pleasure boat of more than 8 tonnes with navigation certificate and registration certificate as a French vessel. The boat was to be

1 — Translated from the French