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

delivered ex quay Cannes and was at the buyer's risk as from 15 February 1979.

I will assume for the purposes of the case that Mr Nanni in fact paid value-added tax in France on the purchase of the new boat (at the rate of 33 1/3%) and that he did not receive any refund of tax when it was exported to the Netherlands. I also assume that Mr Van Zanten received the navigation and registration certificates for the boat although the contract of sale does not specify their numbers.

On 16 February 1979 Mr Van Zanten, through the agency of the company Gaston Schul, a customs forwarding agent, presented the boat intended for his private use to the customs office at Wernhout (the Netherlands).

The Netherlands revenue authority thereupon claimed and levied an amount of HFL 31 014 by way of Netherlands turnover tax at the normal rate applicable within the country on the delivery of goods of that kind (18% on HFL 172 300, the "import value" of the goods).

Mr Van Zanten objected to this taxation, contending that the boat had already been subject to value-added tax within the common market, namely in France, and that he had received no refund on export.

When that objection was rejected on the ground that the taxation had been levied pursuant to the provisions of the Netherlands law of 1968 on turnover tax, the company Gaston Schul and Mr Van Zanten brought the matter before the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch alleging that the taxation in question was contrary to the provisions on the one hand of Articles 12 and, as the case might be, Article 13, and on the other, of Article 95 of the EEC Treaty.

In their view the levying of turnover tax on importation into the Netherlands was carried out pursuant to Article 1 of the Netherlands law of 1968 implementing Article 2 of the Second Council Directive of 11 April 1967 on the harmonization of the laws of the Member States relating to turnover taxes. That directive was subsequently replaced by the Sixth Council Directive of 17 May 1977 (Common system of value-added tax: uniform basis of assessment). However, they contend that the latter directive is contrary to the Treaty in two respects:

On the one hand it imposes the levying of a tax on the importation by a private person into a Member State of second-hand goods bought from another private person in another Member State. It therefore infringes Articles 12 and 13 of the Treaty by virtue of which the purchase of *second-hand* goods by a private person from another private person is not liable to turnover tax either in France or the Netherlands.

Further, although the turnover tax levied in the Netherlands does indeed form part of a "general system of internal taxation applied systematically ... to domestic products and imported products alike" within the meaning of the judgment of 28 June 1978 in Case 70/77 *Simmenthal* ([1978] ECR 1453) it was not levied in the present case either "in accordance with the same criteria" or "at the same stage of marketing" as stated in the same judgment, since the sale of second-hand products in the Netherlands in a transaction between private persons is not subject to turnover tax.

Even assuming that the taxation upon importation was justified in principle the product ought, in accordance with Article 96 of the Treaty, upon being exported from France, to have benefited from a repayment of the internal taxation equal to the taxation imposed directly or indirectly on it by way of French value-added tax. The directive, however, does not provide for any exemption in the event of importation by a private person into a Member State of goods bought from another private person in another Member State and is accordingly unlawful.

In those circumstances the Netherlands court is asking this Court to decide upon the validity of Article 2, point 2, of the directive with regard both to the customs provisions (Articles 12 and 13) and to the tax provisions (Article 95 et seq.) of the Treaty. I shall consider these two aspects in turn.

It is appropriate however first of all to define the limits of the examination for which the Netherlands court is asking: it is not a question of considering the validity of Article 2, point 2, of the Sixth Directive generally, but only with regard to the levying of turnover tax on the importation of second-hand goods passing from one private person to another, that is to say, what are called "registered" second-hand goods.

I — (1) If the principle of the free movement of goods is considered in the present case, the simple fact that the second-hand product has passed from one Member State to another has made it more expensive. However, although the taxation to which the boat was subject in the Netherlands was imposed *on importation,* it cannot be considered as a charge having effect equivalent to a customs duty within the meaning of Article 12 of the Treaty.

It is internal taxation which is an integral part of the *fiscal* system in relation to turnover taxes. The fact that it may apply, according to different criteria and at a different stage, to domestic and imported products in no way deprives it of that characteristic but at most has to be considered in the light of the tax provisions of the Treaty.

Those provisions which are set out in Chapter 2 of Title I (Common Rules) of Part Three (Policy of the Community) of the Treaty are on a par with those relating to the elimination of customs duties which form part of Chapter 1 of Title I (Free movement of goods) of Part Two (Foundations of the Community) of the Treaty.

As the French Government pertinently pointed out in its oral observations, that was confirmed by the judgment of the Court of 22 October 1974 in Case 27/74 *Demag* ([1974] ECR 1037) of which I will quote the sixth paragraph at p. 1045:

"Articles 12 and 13 on the one hand and 95 on the other cannot be applied jointly in the same case, since charges having an effect equivalent to customs duties on the one hand and internal taxation on the other are subject to different systems and provisions.

Further, it is not only turnover tax and charges of a similar nature which are to be regarded as internal taxation but also the charges and other measures intended to compensate the effects of these charges with regard to import and export of goods."

The consequence of the special nature of the tax provisions is that they are *independent* of the provisions of the customs union. It is not therefore possible to make the latter prevail over the former or to resolve the difficulties involved in implementing the latter by having recourse to the "effectiveness" of the former: a customs union is not synonomous with a tax union.

(2) It had not escaped the notice of the draftsmen of the Treaty that, depending on the procedures laid down for its application, direct or indirect taxation is capable of presenting an obstacle to the achievement of the aims which they had set themselves.

As regards internal taxation of any kind imposed on products directly or indirectly, the draftsmen of the Treaty were particularly concerned with turnover tax (Chapter 2 of Title I; Common Rules).

National taxation and repayments of this nature were the subject of Articles 95, 96 and 97. I say "were", for the laws of the various Member States in that field have begun to be harmonized "in the interest of the common market", as provided for in Article 99, except in the case of Greece where the Community value-added tax is not yet in force.

The first Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes provided that the Member States had to replace their systems of turnover taxes by a common system of value-added tax. Its philosophy was expounded in the opinion delivered by Mr Advocate General Mayras in Case 51/76 *Nederlandse Ondernemingen* ([1977] ECR 113) in which judgment was given on 1 February 1977. Let us recall that according to that system at each stage of taxation value-added tax is chargeable and calculated at the relevant rate on the price of the goods or service *after deduction* of the amount of value-added tax borne directly by the cost of the various price components. This system, which ensures the neutrality of turnover tax as regards the origin of the goods and of the services provided involves, as regards trade between Member States, the abolition of remissions at the frontiers in respect of this tax which had previously been permitted under Articles 95 and 96 of the Treaty (Article 2 of the First Council Directive of 11 April 1967).

It was the Second Council Directive, adopted on the same day, which in fact established the principles governing the structure of and the procedures for implementing the common system of value-added tax.

The Sixth Council Directive of 17 May 1977 on the uniform basis of assessment of value-added tax also *concerned* with the abolition of tax frontiers in order to achieve in time a market having the same characteristics as those of a genuine common market. Although that directive, as we shall see, has to be complemented, it already constitutes a genuine common code of value-added tax.

The mechanism of deductions (Article 17 of the Sixth Directive) remains the corner-stone of the common system. At each stage of production or marketing of goods the sum to be paid to the tax authorities is determined by deducting from the amount of chargeable tax the tax paid by the suppliers at the previous stage. A taxable person is entitled to deduct from the value-added tax which he is liable to pay the value-added tax charged at a previous stage on goods supplied and services rendered by another taxable person, on imported goods and on goods delivered and services rendered to himself.

Article 17 (4) provides:

"The Council *shall endeavour* to adopt before 31 December 1977, on a proposal from the Commission and acting unanimously, Community rules laying down the arrangements under which refunds are to be made in accordance with paragraph (3) to taxable persons not established in the territory of the country." (Emphasis added.)

Article 17 (6) provides:

"Before a period of four years at the latest has elapsed from the date of entry into force of this directive [the date was originally 1 January 1978 but was altered to 1 January 1979 in the case of Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg and the Netherlands], the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value-added tax. Value-added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this directive comes into force."

Thus turnover taxes levied in the Member States became partially harmonized. They have, at least to some degree, lost their character of national taxation and become part of a "common system".

There is an additional reason for considering that turnover tax levied according to the "common system of value-added tax" has a Community character. Since the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Community's own resources, "such resources shall include ... those accruing from the value-added tax and obtained by applying a rate not exceeding 1% to an assessment basis which is determined in a uniform manner for Member States according to Community rules". (Article 4 (1)). Council Regulation No 2892/77 of 19 December 1977 implemented the Decision of 21 April 1970 as regards own resources derived from value-added tax.

In technical terms that basis is the "real basis of assessment" of the last stage in the application, that is to say, the price "exclusive of value-added tax" of sales and services to the consumer who is not entitled to deduct previous tax.

It follows not only that the taxation in question levied in the Netherlands is not a charge having an effect equivalent to a customs duty within the meaning of Article 12 of the Treaty but also that, properly speaking, it is not "internal taxation" within the meaning of Article 95, as are still, for example, excise duties on alcoholic beverages, tobacco, petroleum products, stamp duties or other taxes which cannot be characterized as turnover taxes (cf. Article 33 of the Sixth Directive). It also follows that although Articles 95 and 96 still apply to such duties or taxes they have ceased to apply to turnover taxes levied according to the common system of value-added tax.

II — The objective of the Sixth Directive, as moreover of Articles 95, 96 and 97, is to establish competitive neutrality between undertakings (Article 3 (f) of the Treaty).

To that end Article 2 of the directive, which has replaced Article 2 of the Second Directive, and the national laws adopted or amended to conform with it, makes 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."

For trade between Member States and non-member countries the common system of value-added tax remains based on the principle, which derives from current international practice, of applying the taxation of the "country of destination", that is to say, the country of consumption. That principle is at the origin of the tax frontiers which exist within the Community. Importation, an operation which consists of bringing goods "within the country", is subject to taxation at the frontier, with adjustments under Article 14 of the directive. On export, the remission of tax is also carried out at the frontier (Articles 15 and 16).

This Court confirmed that principle in its judgment of 9 October 1980 in Case 823/79 *Carciati* ([1980] ECR 2773):

"As regards the prohibition imposed by a Member State on persons resident in its territory on the use of vehicles imported temporarily tax-free, it is an effective way of preventing tax frauds and ensuring that taxes are paid in the *country of destination* of the goods." (Paragraph 10 of the decision at p. 2780.)

Free movement of goods within the common market in no way means that they do not have to be taxed in the country of destination. The only principle which the Member States have to observe in that respect is the prohibition of discrimination between national and imported goods (Article 95).

In most cases the common system of value-added tax ensures that competition is not distorted in the common market. It thus contributes to the abolition of obstacles to the free movement of goods and makes recourse to the average rates provided for in Article 97 before the common system was introduced redundant. Since value-added tax involves taxation of the goods in exact proportion to their price the application to the value of imported products of the rate to which they are subject in the country of importation ensures equality of treatment between national and foreign products. In the same way, since exportation is itself exempt from tax, repayment on exportation of the tax levied on the purchase of the exported products or of the products necessary for their manufacture means that there is in fact remission of tax on sales abroad.

There remain however a certain number of anomalies. That is so in the case of so-called "second-hand" goods.

(1) Even the definition of second-hand goods is not simple. In a general way it may be said that second-hand goods are goods which may, if necessary after

being reconditioned, be re-used in the place of new goods serving the same purpose.

But that description covers:

Durable consumer goods which lose value during successive periods of use;

"Registered" second-hand goods such as motor vehicles and boats;

Works of art and collectors' items, the value of which on the contrary may increase with the passage of time.

All such goods have the characteristic that once they have reached the ultimate consumer at the end of a series of trade transactions they may, after some use, be re-introduced into trade or use. No matter to what category they belong they may have moreover the characteristic, in contrast to new goods, of being able to be transferred without the intervention of a trader.

Thus in the present case the boat which was bought was used, at least I assume so, in part in France if it had been bought there new and had been registered there, and in part in the Netherlands, the Member State into which it was then imported.

Let me say that with regard to the Netherlands turnover tax Mr Van Zanten is the *taxable person* whereas the Gaston Schul company is *liable* for the tax.

When goods held by a private person, who is a non-taxable ultimate consumer, are acquired second-hand by *a taxable person,* a "residual" tax burden is contained in the purchase price paid by the taxable person. When in turn he re-sells the goods (possibly after repair) and he cannot deduct the amount of the tax burden borne at the previous stage, the value-added tax, in the absence of a special scheme, applies to the whole re-sale price and not simply the value which the re-seller may have added. Goods exempt from the right of deduction are subjected to double taxation and for this reason the product sold to the new ultimate consumer is burdened with a tax "residue".

In the same way, when a pleasure boat belonging to a private person, a non-taxable ultimate consumer, is re-sold second-hand to another *non-taxable* private person, there is a tax residue in the price charged to the latter since the seller has not been able to deduct the value-added tax paid on the boat when it was new. The result is an *aggregation* of tax.

Achievement of the objective of neutrality in taxation, and thus taxation of second-hand goods, is difficult, since in the trading of such goods a whole range of very different persons may be involved. The goods may have been sold *by* the first user who may have been able to deduct value-added tax, or by a private person who has not been able to deduct it if he is not a taxable person or if there is some special provision prohibiting such deduction even by taxable persons (cf. Article 13 (B) (c) of the directive). The goods may be sold to a mere private person or to a taxable person, being an occasional or full-time dealer, who in turn re-sells the goods, possibly after reconditioning them.

When the use of the goods continues not in the country of origin (France) but in another Member State (the Netherlands) as a result of importation into that State, the importation amounts, from the tax point of view, to bringing the goods back into circulation. It is as if from the time they crossed the tax frontier the goods were brought back into circulation. The private person, Mr Van Zanten, becomes a taxable person within the meaning of Article 4 of the directive simply because the second-hand goods which he has acquired crossed a frontier.

(2) The problem of the absence of taxation, or on the contrary, that of double taxation in relation to value-added tax within the Community, had already been raised when the First Council Directive was in the course of preparation.

A Community system for alleviating taxation on importers' turnover tax and excise duty was established by a Council Directive of 28 May 1969 in connection with international travel.

Another Council Directive of 19 December 1974 allows tax reliefs on the importation of goods in small consignments of a non-commercial character within the Community.

The Sixth Directive itself provides that where movable tangible property (including motor vehicles) has undergone in another Member State work or repair which has been taxed without the right to deduction it may be re-imported free from further tax into the Member state from which it has been temporarily exported (Article 14 (1) (f)).

However, as regards "second-hand goods" none of the suggested solutions has been adopted and Article 32 of the Sixth Directive is confined to stating:

"The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977 a Community taxation system to be applied to used goods, works of art, antiques and collectors' items.

Until this Community system becomes applicable, Member States applying a special system to these items at the time this directive comes into force may retain that system."

On 11 January 1978 the Commission submitted to the Council a proposal for a seventh directive on a "common system of value-added tax to be applied to works of art, collectors' items, antiques and used goods". On 16 May 1979 it made certain amendments to that proposal. The proposal relates in particular to pleasure boats (Article 4 (1)), but the Council has not yet issued a directive. In any event, for the purpose of eliminating any tax residue, the proposal is intended to allow only *taxable persons* to deduct the value-added tax contained in the sale price of the second-hand goods sold to them by a private person. It does not cover the passing of such goods from one private person to another.

The fact that the time-limit of 31 December 1977 fixed by the Council has passed in no way allows private persons to rely on any kind of "effectiveness" of the provision.

(3) The free movement of second-hand goods is, it is true, affected by this double taxation. "Whereas, in order that the people of the Member States should be made more aware of the existence of the European Community, further

measures to benefit the individual should be taken in order to create similar conditions in the Community to those in a domestic market" (first recital in the preamble to the proposal for a directive on tax exemption applicable to personal property of individuals on permanent importation from another Member State submitted by the Commission to the Council on 30 October 1975). Nevertheless, contrary to what counsel for the company Gaston Schul suggests, that situation results not from oversight but is intended.

There is in that kind of taxation a choice of economic policy corresponding in my opinion to the present state of Community law.

It must first of all be observed that such taxation on importation does not specifically benefit second-hand goods sold in the Netherlands. It works in the same way to the advantage of second-hand goods sold in all the Member States and to the detriment of second-hand goods bought in other Member States. In that respect all private persons of all the Member States who import second-hand goods are on an equal footing with regard to public charges. The case-law of the Court does not consider all inequality of treatment as arbitrary discrimination but only differences which cannot be objectively justified.

Some degree, at least, of taxation of the boat imported into the Netherlands in any event remains justified by the principle of taxation in the country where the use of the boat continues. There might be reason to fear circumvention of the normal commercial channels if it were possible, without paying value-added tax, to import into a Member State second-hand goods (a motor vehicle for example) bought from a private person in another Member State and not charged with value-added tax on that occasion whereas the export of the same goods purchased from a taxable person would not create a right to deduction.

To obtain goods at the lowest rate of value-added tax it would be sufficient for a person to buy them second-hand in the Member State where that rate is in force and then import them into his own country. As is known the rates of value-added tax are still not unified.

Moreover, the turnover tax of 18% levied in the Netherlands is not calculated on the purchase price of the boat new but on the invoice price charged by Mr Nanni to Mr Van Zanten. That price in principle ought to take account of the depreciation of the goods and the fact that the residuary tax burden contained in the sum paid by Mr Van Zanten was not deductible by him. If the sale price paid by Mr Van Zanten was correctly calculated by Mr Nanni the taxation on importation is not more than the part of the value-added tax passed on in the Netherlands by a private person who sells a second-hand boat to another private person.

(4) Mr Van Zanten and the company Gaston Schul appear to maintain, in short, that in the absence of complete exemption from turnover tax on importation into the Netherlands an abatement should have been allowed at least to the

extent of the indirect residue of turnover tax and that the boat could benefit, upon being exported from France, from a repayment of the tax charged on it there.

To share that point of view it would be necessary that instead of applying the system of "tax less tax" deduction provided for by the directive (the tax is based on the difference between the tax on sale and the tax on purchase) there would have to be applied the system of "price less price" deduction according to which the tax would be charged on the difference between the purchase price and the selling price. The supplier's invoice would thus serve as proof for the purposes of deduction at the following stage. However that invoice does not show the part of value-added tax contained in the price paid by the buyer. Further such a system of repayment would assume taxation on delivery of the boat by Mr Nanni to Mr Van Zanten: any grant of exemption necessarily presupposes proof of previous taxation.

Let me observe that private persons who confine themselves to trading in second-hand goods within one and the same Member State would not be in favour of such taxation which in addition, in the present state of Community law, is impossible, for the directive requires (Article 13 (B) (c)) Member States to exempt the supply of goods where value-added tax was paid on their acquisition and did not become deductible (Article 17 (6)).

To grant even a partial repayment of value-added tax on the exportation from France, where the boat was also used, it would have been necessary, on the occasion of the sale by Mr Nanni, to determine on the one hand the "residue" of tax incorporated in the price paid by Mr Nanni and on the other hand to levy and recover the turnover tax corresponding to the subsequent use of the boat by Mr Van Zanten in the Netherlands.

Both the States and the institutions which have submitted written or oral observations in the present proceedings have stressed the administrative complications which this would entail and which would in certain cases be out of proportion to the interests involved. Private persons who engage in such transactions would have to become accountants and collectors of taxes.

Apart from such exacting administrative problems there is a much more serious difficulty. It has to do with the manner in which the product of the value-added tax levied on the use of second-hand goods is distributed between the Member States. The way in which this is done depends on whether such use is confined to the State of origin of the goods or, as in the present case, continues in another Member State and the procedures of taxation in the State of origin do not fall within the jurisdiction of the State of importation and conversely. The first recital of the preamble to the Commission's proposal on the Community system of taxation applicable, in relation to used goods puts the problem in clear terms: this system "should avoid deflection of trade within the Community, and ensure that the application of the Community rate to such transactions produces equitable results in all Member States, for the purposes of the Community's own resources".

(5) I would join with the Italian Government in adding that as regards any effect of double taxation in the case of exportation to another Member State it was held by the Court in its judgment of 29 June 1978 in Case 142/77 *Larsen* ([1978] ECR 1543):

"... the EEC Treaty contains no provisions prohibiting effects of double taxation of this type.

Although the abolition of such effects is doubtless desirable in the interests of the freedom of movement of goods, it can however only result from the harmonization of the national systems under Article 99 or possibly Article 100 of the Treaty." (Paragraphs 33 and 34 the decision).

To eliminate the difference in treatment of which Mr Van Zanten and the company Gaston Schul complain it would be necessary:

To eliminate the exemption from value-added tax from which occasional sales between private persons benefit in the Member States;

To provide for an appropriate rate of value-added tax for such sales;

To allow, where such goods are exported to a Member State other than the State where they were acquired second-hand, a refund on exportation.

All this presupposes complete unification of the basis of assessment to tax and an approximation or indeed even a unification of the rates. It cannot be maintained that the Sixth Directive is unlawful because it has not provided for all these procedures. It is not possible to make up for the absence of a special Community system for second-hand goods merely by declaring that Article 2, point 2, of the directive is invalid, when there are various procedures which could supply this omission. The only way possible is recource to Article 99 of the Treaty.

In answer to the questions raised I propose that the Court should hold:

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 is valid inasmuch as it provides that each Member State is to subject to value-added tax the importation by a private person of a second-hand boat coming from another Member State, even though the supply of such goods would not be subject to that tax if it had taken place under the same conditions within one or the other of those States.