

?????? C-440/08

F. Gielen

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Staatssecretaris van Financiën

(?????? ??? Hoge Raad der Nederlanden ??? ??? ?????? ?????????????? ??????????)

«?????? ??? – ??? 43 ?? – ?????????????? ??? ??? ?????? ?????????? ?????????? –
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(????? 49 ????)

????????? ??? ??? 49 ??? ? ?????? ?????? ???? , ??? ?????? ?? ?????????? ???
????????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ?????? ?????????? ?? ?????????? ???
????? ?????????? ?????????? ?????? ??? ?????? ?????? ?? ?????????? ?????????? , ??????????
????????? ?? ?????? ??? ?????? ?????????? ??? ?????? ?????? ?????????? ?????????? , ??? ???
??????? ??? ?????????? ??? ?????? ?????? ?? ?????? ?????? ??? ?????? ?????????? ??
????? ?????????? ?? ??? ?????? ??? ?????? , ??? ??? ?? ?? ?????????? ?????? ?????? ??????
?? ?????????? , ?? ?????? ?? ?? ?????? ??? , ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??
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??????????????, ??? ? ?????? ??????? ? ?????, ??? ?????? ??? ?????? ??? ?????????? ??? ??????????????
????????, ??????????????, ??? «????????? ??? ??????????» ??? ?????? ??? ?????? ?? ??? ?????? ??
?????????????? ?????????? ?????????? ?? ?????????????? ??? ?????????? ??? ?????? ?????????? ??? ??????
????????????? ?? ??? ?????? ?????? ?????? ?????? ??? ?????? ?????????? ?????? ??? ?????? ??
????????????? ??? ?????? ?????? ?????? ??????. ??? ????????, ? ?????? ??? ?????? ??????
????? ????????, ??? ???????????, ??? ??? ?????? ??? ?????? 49 ????. ? ????????, ???
????????????? ??? ?????? ??? ??????????? ??? ?? ???????? ??? ?????? ??????????????????
????????? ?????????? ?????????? ?? ?????????? ?????????? ??? ?????????? ??? ?????????? ???
????????? ?? ?????????? ?????? ??? ?????????? ?????????? ??? ?????????? ??? ?????????? ???
??? ??????? ??? ?????????? ?????? ?????? ?????????? ??? ?????????? ??? ?????? ??? ??????
?? ?????????? ?? ?????????? ?????????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ???
?????????. ??????????????, ?? ?????????? ??? ?????? ??? ?????? ??? ? ?????? ??? ?????? ??? ??
???? ??????????, ? ?????? ?? ??? ?? ?????????? ?? ?????? ??? ?????????? ??? ?????? ??? ?????????? ???
?? ?????? ??????????, ???????, ?????????? ?? ?? ?????? 49 ????, ??? ??? ??? ??????????
?????????. ???????, ?????????? ?????? ?????? ?????? ?????????? ??? ??????????
????????????? ??? ?????? ?? ?????? ?????? ?????? ?????? ??? ?????? ??? ??????, ??? ??? ?? ?
????????? ??? ?????? ??????????. ??? ????????, ?? ?????? ??? ?????? ??? ?????? ??? ?????????? ??
????? ?????????? ??? ?????? ?????????? ??? ?????? ?????? ?????????? ??? ?????? ??? ??
????????? ??? ?????? ??????????.

(???. ??????? 48-55 ??? ????????)

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??? 18?? ??????? 2010 (*)

«????? ??????? – ??? 43 ?? – ?????????????? ??? ?????? ?????? ?????? –
????????????? – ?????? ?????? ??? ?????? ??? ?????? ?????? ?????? – ??????
????? ?????? ?? ?????? – ?????? ?????? ?????? ?????? ?????? ?????? ?????? ??????
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???? ??????? C?440/08,

?? ?????????? ?? Hoge Raad der Nederlanden (????? ?????) ?? ??????? ?? 12?? ??????????? 2008, ?? ?????? ?? ??????? ?? 6 ??????? 2008, ?? ??????? ?? ?? ??,

F. Gielen

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Staatssecretaris van Financiën,

?? ?????????? (?????? ????),

?????????? ?? A. Tizzano, ?????? ??????, ??????????? ?? ?????? ???????, E.

Levits, A. Borg Barthet, M. Ileši? (?????????) ??? J.-J. Kasel, ????????,

?????? ??????????: D. Ruiz-Jarabo Colomer

?????????: M. Ferreira, ???? ?????????? ??????????,

?????? ????? ??? ??????? ?????????? ??? ??????? ??? ??' ?????????? ?????????????? ???
17?? ?????????? 2009,

????????? ????? ??? ?????????? ??? ????????:

- ? F. Gielen, ?????????????? ??? ??? F. A. Engelen ??? S. C. W. Douma,
belastingadviseurs,
- ? ?????????? ??????????, ?????????????? ??? ??? C. Wissels, C. ten Dam ??? M. Noort,
- ? ?????????? ??????????, ?????????????? ??? ??? M. Lumma ??? C. Blaschke,
- ? ?????????? ??????????, ?????????????? ??? ??? L. Uibo,
- ? ?????????? ??????????, ?????????????? ??? ?? C. Guerra Santos ??? ??? L. Inez
Fernandes ??? J. Menezes Leitão,
- ? ?????????? ??????????, ?????????????? ??? ??? A. Falk,
- ? ?????????? ??? ?????????? ??????????, ?????????????? ??? ??? R. Lyal ??? W.
Roels,

???? ?????? ??? ?????? ?????????? ??? ??????? ??? ?????? ??? ?????? ??? ?????? ???
??? 27?? ?????????? 2009,

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1 ? ?????? ?????? ?????????? ?????????? ?????? ??? ?????? ??? ?????? 43 ??.

2 ? ?????? ??? ?????????? ??? ?????? ?????? ?????? ?????? ??? F. Gielen ???
??? Staatssecretaris van Financiën ?????? ?? ??? ??? ?????????? ??? ?? ??? 2001.

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3 ? ?????????? ??? 2001 ??? ?????????? ?????????? (Wet op de
Inkomstenbelastingen 2001, ??? ????: ?????? ?? 2001) ?????????? ??? ?????? 2, ?????????? 1,
????????? b, ??? ??? ?????? ?????????? ?????????? ?? ?????? ?????? ??? ??? ??????????
????? ??? ?????, ??? ?????????? ?????? ??? ?????? ??? ?????? ??? ?????????? ??? ?????? ???.

4 ?????? ?? ??? 3.2 ??? ?????? ??? 2001, ?? ?????????? ?????? ??? ?????? ?? ??????
??? ?????????????? ? ?????????? ??? ?????? ?? ?????????????? ??? ?????? ?? ??????????
????????????? ??? ?????? ??? ?????????? ??? ?????? ??? ?????? ??? ?????????? ??? ?????? ???
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5 ??? ?? ??? 3.76, ?????????? 2, ??? ?????? ??? 2001, ?? ??? ??? ?? ??? ?????
????????? ??? ?? ??? ??? ??????, ??????? ?? ??? ?????? ??? ?????? ?????? ??? ?????????? ???
??? ?????? ????. ? ?????? ?????? ??? 6 084 ??? ??? ?????? ??? 11 745 ??? ??.

? ?????????? ????????, ??? ?? ?????? ?????? ?? 2 984 ????, ?????? ?? ?????? ?????????????? ?? 50 065 ????.

6 ??????? ?? ??? ?????????? 1 ??? ?????? ?????? ??????, ?? ???????? ?????????? ?????? ????
????????????? ?????????????? ?????????? ??????, ??? ??? «????????? ??? ??????????».

7 ??? ?? ????? 3.6 ??? ????? ??? 2001, ??? ?? ?????????? ?? ?????????? ???, ?????? ??
???? ?????????? ?????? ??? ?????????? 1 225 ??? ????? ?? ?????????? ???
????????????? ?????? ?? ??? ? ?????????? ?????????? ?????????? ??? ??? ?????? ?
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8 ??? ?? ?????????????? ?? ? ?????????????? ??? ?????? ?????? ?????????? ?????? ??
????????? ????????, ?????????? ?????? ??? ?????? ?? ?????? ??? ?????????? ? ?????????????? ??
????? ??? ?????????????? ?????????? ?????? ??? ?????????? ?????? ?????? ?????????????? ??
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9 ????????, ? ?????????? ?????? ?????????? ?????????? ??? ?????????? ?? ???? ?????? ??
??????, ??? ?????? ??? ????????, ?????? ?? ????????, ??????? ?? ???? 2.5, ?????????? ??
1, ??? ?????? ?? 2001, ??? ?????? ??? ?????? ?????? ??? ?????? ??? ?????? ??? ?????? ???
????????????? ?????? (?? ?????: ??????? ?????? ??? ?????? ??? ??????????).
????? ??? ?? ??? ??????, ??? ?????????? ?? ??? ????? ?????????? ?? ??? ?????? ???
????????????? ?????? ?????????? ?? ?????? ??? ?????????? ?? ??? ?????? ??? ?????????? ???
?????. ? ?????? ??? ?????? ?????????? ?? ????:

«? ?????????????? ?????? ?????? ??? ?????? ?????????? ??? ?????? ???' ??? ??
????????????? ??? ? ?????????????? ?????? ?????????? ? ???????, ?? ????????
????? ?????? ??? ?????? ??? ?????????? ?????? ??? ?????? ?????? ??? ?????????? ??
????????? ?????? ??? ?? ??? ????? [?? ?????? ??? ??????] ??? ?????? ?????? ??????????
?? ??? ?????? ??? ?????? ?????????? ??? ?????????? ??? ?????????? ??????????????,
????????????? ??? ?? ??? ?????? ?????? ??? ?????? ??? ?????? ??? ?????? ?????? ??? ?????????? ???
????? ??? ?????? ?????? ?????????? ??? ?????????? ??? ?????? ??? ?????? ??? ?????? ??? ?????
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10 ??? ?????? ??? ?????? 2 ??? 10 ??? ?????????? ?????????????? ?????????????? ??? ??
??? 2001 (Het Uitvoeringsbesluit inkomenstbelasting 2001) ?????????? ?????? ???
????????? ?? ??? ?????? ?????? ??? ?????????? ??? ?? ??? ?????? ?????????????? ??????????
????????? ??? ?????? ??? ?????? ??? ?????????? ??? ?????????? ??? ?? ?????????? ?? ??? ??? ??? ??
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11 ?? ????? 3 ??? ?? ?????? ?????????? ?????????? ?? ????:

«1. ? ??????? ??? ?????????? ??? ?????? ??? ?? ?????????? ??? ?????? ? ???????
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????? ??? ?????? ??? ?????? ??? ?? ?????????? -?? ??? ?????????? ?? ??? ?????? 2 ??? 10-
????????? ?? ??? ?????? ??? ?? ?????????? ??? ?????? ??? ?????????? ??? ?????? ??? ?????? ? ??????
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????????? [...] ??? ?????????? ??? ?????????? ??? ?????? ??? ?????????? ??? ?????? ??? ?????? ???
????????? ??? ?????? ???.

[...]

5. ?? "????????? ??? ??????????? ??? ????? ??????????" ??????? ?? ??????? ???
????????? ??? ??????? ? ?????? [...].

12 ?? ????? 9, ?????????? 1, ??? ?????????? ?????????? ??? 2001 ??? ?? ?????? ???
?????? ?????????? (Besluit voorkoming dubbele belasting 2001) ?????????? ?? ???:

«?? ?????????? ?????????? ??? ?????????? ??? ?????????? ? ?????? ?? ??? ?????? ?????? ??
?????? ??? ?????????? ??? ?????? ? ?????? ??? ?????????? ??? ?????????? ??? ?????????? ???
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a) ?????? ??? ?????????? ??????????, ?????? ?????????? ? ?????? ?????????? ???
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[...]».

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13 ? F. Gielen ??????? ??? ???????, ??? ???????????????, ??? ?? ??? ?? ??? ???????,
??? ?????????? ??????????? ?? ??????????. ??? ?????????????? ??? ?? ??? ?????????? ???
?????? ?????????????? ?????????? ??? ?? ??? ?????????? ?????????????? ??? ?? ???
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14 ??? ?? ??????? ??? 2001 ? F. Gielen ??????? ??? ?? ?????????? ???
????????? ??? 1 225 ??? ?? ???????, ?? ??????? ?????????? ??? 1 225 ???
????????? ??? ?????? ?????????? ?????????? ??? ?? ???.

15 ??? ??????, ?? «????????? ??? ??????». ?? Rechtbank Breda ?????????? ??? ?????? ???
????????? ???.

16 ???????, ?? Gerechtshof te 's-Hertogenbosch ?????? ??? ?? ? ??????? ??? ?? ???
????????? ??????? ??? ??????? ??? ?????????? ??? ?? ?????????? ??? ?? 43 ??, ???
????????? ??? ??????? ??? ?????????? ??? ?????????? ??? ?? ?????? ?????????????? ???
????????? ??? ???????, ?? Gerechtshof te 's-Hertogenbosch ?????? ?????????? ???, ???
??? ??????? ??? ??????? ??? ???????, ?? ?????????? ?????? ?????????? ??? ??????? ???
????????? ??? ??????? ?? ?? ?????? ???, ?????????? ??? ?? ?????? ??? ??????? ???
?? ?????? ???????????.

17 ?? Gerechtshof te 's-Hertogenbosch ?????? ??? ? ?????????????? ??? ?? ??? ??
???? ?? ?????????????? ??? ?? ?????? ?????????? ??? ?????? ??????? ???
????????? ??? ?????? ??? ?????????? ??? ?? ?????????? ??? ?????????? ??? ???????, ???
????? ??? ?? ?????????? ??? ?????????? ??? ?? ?????????? ??? ?????????? ???.

18 ? F. Gielen ?????? ??????? ??? ?????? ??? ?????????? ??? Gerechtshof te 's-Hertogenbosch
?????? ??? Hoge Raad der Nederlanden. ? F. Gielen ?????? ??? ?? ??????? ??? ?? ???
????????? ??? ?????? ?????????????? ??? ???????, ?? ?????????? ?????????? ???
????????? ??? ?? ?????????? ??? ?????????? ??? ??????? ?????????? ??? ?????????? ???
?? ??? 43 ??.

19 ??? ?? Hoge Raad der Nederlanden, ? ??????? ??? ?? ?????? ??? ?????? 43 ??
????????? ??? ??????? ??? ?????? ?????????? ??? ?????????? ??? ?????????? ???.

? ?????????? ???? ???? ?? ???? ???? ?????? ?????? ?????? ?????? ?????? ???, ?????? ????
????? ???? ?????? ???? ?? ???? ???? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ????
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20 ?? ?? ???? ?????????? ?????? ?????? ?? ??????? ?? ???? ?????? ?????? ?????? ?????? ????
??? ?????? ?????? ?????? ?? ???? ?????? ?????? ?? ?????? ?????? ?????? ?????? ?????? ?????? ????
?? ?????? ?????? ?? ???? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ??????
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21 ??' ?????? ??? ????????, ?? Hoge Raad der Nederlanden ?????????? ?? ?????????? ??
????????? ?? ???? ?????? ??? ?????? ?????? ?? ?????? ?????? ?????????? ?????? ??????:

«???? ?? ????? 43 ?? ??? ?????? ??? ?? ?????????? ??? ?????? ?????? ?????? ?????? ?????? ???
????????? ?????? ?????? ?????? ??? ?????? ??? ?????? ??? ?????????? ?????? ?????? ??????
????? ?????? (????????? ??????????????) ??? ?? ?????? ??? ?????? ?????? ?????? ??????
????????? ?????? ??? ?????????? ???, ??? ?????? ?????? ?????? ?????? ?????? ?????? ??????
?????, ??? ?????? ??? ?????????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ??????
????????? ?????? ??? ?????? 43 ??, ??? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ??????
?? ?????????? ?? ?????? ?? ?????? ?????? ??? ?????? ?????? ?????? ?????? ?????? ?????? ??????
?? ?????? ??? ?????? ?????? ??? ?????? ??? ?????? ??? ??????;»

?? ?? ?????????? ??????

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22 ?? ?????????? ?? ???? ?????? ?????? ?????? ?????? ?????? ?? ?????? ?? ??????????
????? ?? ?????? ?? ???? ?????? ?????? ?? ?????? ?????? ?????? ?????? ??????.

23 ??? ?? ?????????? ?????? ??, ?? ?????? ?????? ??? ?????? ?????? ??? ?????? ??????
????????? ?????? ??? ?????? ?????? ???' ?????? ?????? ?????? ??? ?? ??????????????
?? ?? ?????? 43 ??, ??? ?????? ??? ?????????? ?? ?????? ?? ?????? ?? ?????? ?? ?????? ??????
????? ?? ?????? ??? ?????? ??? ?????? ?????? ??? ?????? ??? ?????? ?????? . ??? ?????? ?,
????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ?????? ??? ?????? ??? ?????? ?????? ?????? ???
?? ?????? ??? ?????? ??? ?????? ??? ??????.

24 ?? ?????????? ?????? ?????? ?????? ?? ???? ?????? ?? ?????? ?? ?????? ?????? ??????
????????? ?? ???? ?????? ?????? ?? ???? ?????? ?? ???? ?????? ?? ???? ?????? ??????.

25 ??? ?? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ?????? ??????
?????????, ?? ?? ?????? 3.6 ?? ?????? ?? 2001 ?????? ?????? ?? ?????? ?????? ?????? ??
????? ??, ?? ?? ?????? ?????? ??? ?????? ??? ?????? ?????? , ?????? ?? ?????? ?????? ?????? ??
????? ?????? ??? ?????? ?????? ?????? ?????? ?????? ?? ?????? ?????? ?????? ?????? ?????? ??
????? ?????? ??? ?? ?????? ?????? ??? ?????? ?????? ?? ?????? ?????? ?????? ?????? ?????? ??
????? ?????? ??? ?? ?????? ?????? ?????? ?? ?????? ?????? ?? ?????? ?????? ?????? . ?????? ??
????????? ??? ?????? ?????? ??????.

26 ??? ?? ?????? ?????? ?????? ??? ?? ?????? ?????? ?? ?????? ?????? ?? ?????? ?????? ???
????? ??? ?????? ?????? ??? ?????? ??? ?????? ??? ?????? ?????? ?????? ?????? ?????? ??? ??
????? ?????? ??? ?? ?????? 43 ??, ?? ?????? ?????? ?????? ?????? ?? ?????? ?????? ?????? ??
????????? ?????? ?????? ?????? ?????? ?????? ??? ?????? ?????? ?????? ??????.

27 ?????????? ??? ?????? ??? ?????? ???, ??? ?????? ?????? ???, ??? ?????? ???.

????????????? ??? ?????? 267 ??? ?????????????? ?????????????? ??? ?????? ?????????? ?????????? ???
???? ?????????? ??? ?????????? ??? ?????? ??? ?????? ??? ?????????????? ?????? ?????????? ??????????
????????? ?? ??????????, ?????????? ??? ?????? ??? ?????????????? ??? ?????????? ?????? ?????? ???
????????????? ??? ?????????????? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ???
??? ? ?????????? ??? ?????????? ??? ?????? ??? ?????????? ??? ?????? ?????? ?????? ?????? ???
????????????? ?????????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ?? ??????????
????????????? ?????????? ?? ?????????? (??., ?????? ????, ?????????? ??? 23?? ??????????
2009, C-544/07, Rüffler, ?????? 2009, ?. I-3389, ????? 36, ??? ??? 19?? ?????????? 2009, C-
314/08, Filipiak, ?????? 2009, ?. I-11049, ????? 40).

28 ??????????, ?? ?????????? ??? ?????? ?????? ???, ?? ?????????? ??????????????,
?????? ?? ?????????? ??? ?????????? ??? ?????? ??? ?????? ??? ?????????? ??? ?? ?????? ??????????
?? ?????? ?????????? ??? ??????, ?????????? ?? ?????? ??? ?????? ??? ?????? ?????? ?????? ??
????????? (??., ??' ?????, ?????? ??? 16?? ?????????? 1981, 244/80, Foglia, ?????? 1981,
. 3045, ??? 21, ??? ?????????? ?????? Rüffler, ??? 37, ??? Filipiak, ??? 41).

29 ??? ?????? ?????? ?? ?????????? ?????? ?????? ?????????? ?? ?????????? ??????????
?????? ?????????? ??? ?????? ??? ?????? ??? ?????? ??????????, ?? ?????? ??? ?????? ??? ?????? ??
?? ?????????? ??? ?????? ??? ?????? ??? ?????? ???, ??? ?? ?????? ?????? ?????? ?????? ?????? ???
? ?????? ??? ?? ?????????? ??? ?????? ??? ?????? ?? ?????? ?????? ?????? ?????? ?????? ??? ??????
????????? ?????????? ?? ?????? ?????? ?????? ??? ?????? ?????? ??? ?????? ?????? ??? ??????
(????????? ?????? Rüffler, ??? 38, ??? Filipiak, ??? 42).

30 ??? ?????? ??? ?????????? ? ?????????? ??? ?? ?????? ??? ?????? ?????? ?????? ??????????
????????? ??? ? ?????? ??? ?????? ??? ?? ?????? ??? ?? ?????????? ?????? ?????? ?????? ??????
?? ?????????? ??? ?????? 49 ??? ???? ?? ?????? ??? ?????? ?????? ?????? ??? ??????
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????? ?????????? ??????????, ??? ?????? ??? ?????????? ??????, ??? ?????? ??? ?????? ?? ?????? ???
????????????? ??? ??? ?????????? ?????????? ??????, ??? ?????? ??? ?????? ?? ?????????? ?????? ???
??????, ?????? ?? ??? ?? ??? ?????? ??? ??????, ?? ?????, ?? ??? ?? ?????? ??? ?????, ?? ??????
????????? ??? ??????????.

31 ??????, ??? ?? ?????? ?????????? ??? ?? ?????? ??????, ?????? ?? ??????????
????????? ?? ? ?????? ??? ?????? ??? ?????? ??? ?????? ?????? ?????? ?????? ??????
????????????? ??? ?????????? ?????? ??????????, ??? ?? ?????? ??? ?????? 49 ???, ??????
?? ?????????? ?????? ?????????? ??? ?????? ??? ??????, ??? ?????? ??? ?????? ?????? ??????
????? ?????????? ??? ??????????.

32 ?? ?????????? ??? ?????? ?????? ??? ?????????? ??? ?? ?????? ??? ?????? ?????? ??? ?
????????? ??? ?????? ??? ?????? ??? ?????? ?????????? ??? ?????? ??? ?????? ??? ?? ?????????? ??
????????????? ??? ?????? ??? ?????? ??? ?????? ???, ??? ?? ?????? ??? ?????????? ?????????? ???
????????? ??? ?????? ??? ?????? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ???.

33 ??? ??????, ? ?????? ?????? ?????????? ?????????? ?????? ??? ?????? ??????.

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34 ?? ?????? ?????????? ??? ?? ?????? ??? ?????? ???, ? ?????? ??? ?????? ?????? ??? ?
????????? ?? ??? ???, ?? ?????? ?????? ?? ?????????? ??? ?????? 49 ??? ? ??????
????? ? ?????, ??? ?????? ?? ?????? ??? ?????? ?????? ?????? ?????? ??? ?????? ??? ??????
??? ??? ?????????? ?????????? ???, ?????? ?????? ?????? ??? ?????? ??? ?????? ??
????????? ??? ?????? ??? ?????? ??? ?????? ?????? ??? ?????? ?????? ??? ?????? ??? ?????? ???,

????? ??? ? ? ?????????????????? ?????? ???????, ??????? ? ? ??? ? ???? ?????? ???????, ?? ??????,
?? ??? ? ? ?????? ???, ?? ??????? ??????? ??? ??????????.

??? ??? ?????????????????? ??? ?????????? ??? ?????? ?????? ?????? ?????????? ??? ??????????????
?????????? ??? ??? ?????? ??? ?????? 49 ????

35 ??? ? ? ?????? ?????????? ??? ?????????????? ???????, ?????? ? ? ?????????????? ??????????,
????? ?????????? ??????? ??? ? ???? 31 ??? ?????? ???????, ?? ? ?????? ???
????????? ??? ?????? ?????? ?????? ?????? ?????????? ?????????? ?????????? ?????????? ??????????
????? ? ???? 49 ???.

36 ?????????????? ???, ?? ??? ? ?????? ?????????? ??????? ??? ?????????????? ???
?????? ????, ?? ?????? ????, ?????, ??? ?????? ???, ?? ?????? ?? ???? ??? ?????? ??? ??????
(??., ?????? ????, ?????? ??? 7?? ?????????? 2004, C-319/02, Manninen, ?????? 2004,
. I-7477, ????? 19 ??? ????? ?????????? ??????????).

37 ?????????????? ??? ? ? ?????? ??? ?????? ?????? ?????? ?????????????? ?????????????? ???
????? ??? ??????? ?????????? ??? ?????????? ??? ?????? ?????? ??? ?????? ?????????????? ???
????????? ? ????, ???' ?????? ??? ?????????? ?????????????? ??????????????, ?????????? ??? ?????
??? ??? ?????????? (??., ?????? ????, ?????? ??? 14?? ?????????? 1995, C-279/93,
Schumacker, ?????? 1995, ?. I-225, ????? 26 ??? ????? ?????????? ??????????).

38 ??????, ? ?????? ??? ? ?????? ?? ?????????? ??? ?????? ?????? ?????????? ??????????????
????????? ?? ?????????? ?????????? ? ?????? ?????? ??? ?????? ?????? ?? ??????????
????????? (??., ?????? ????, ?????????? ?????? Schumacker, ??? 30, ???
????? ??? 14?? ?????????? 1999, C?391/97, Gschwind, ?????? 1999, ?. I-5451, ???
21).

39 ?? ??????????, ?????????? ?????????? ??? ? ?????????? ??? ? F. Gielen, ??? ??????
?? ????????, ????????, ??? ? ??????? ??? ?????? 2001, ?????????? ??? 1 225 ???
????????? ??? ?????? ?????????? ??? ?????? ??? ?????? ??? ?????????? ?????????? ???
1 225 ??? ?????? ??? ?????? ??? ? ?????? ?????????? ??? ??? ??????.

40 ?? ?????? ?????????? ??????? ???, ??? ? ? ?????? ?????? ??? ?????? ?????? ??? ?????? ???
?????? ???????, ? ?????????????? ?????? ?????????????? ??? ?????? ?????????? ?????????? ???,
?????????? ?? ?????????? ?? ?????????? ??? ?????????? ??? ?????? ?????????? ??? ?????? ???
????????? ?? ?????????? ??? ?????? ?????????? ??? ?????? ?????????? ??? ?????? ?????? ???
????????? ??? ?????? ?????????? ??? ?????? ?????? ??? ?????? ?????????? ??? ?????? ?????? ???
????????? ??? ?????? ?????????? ??? ?????? ?????? ??? ?????? ?????? ??? ?????? ??? ??????
????????? ??? ?????? ?????????? ??? ?????? ?????? ??? ?????? ??? ?????? ??? ?????? ???
?? ??? ??????.

41 ???????, ? ?????????? ?????????? ???????, ?? ??? ?????? ?????????????? ???, ???
?? ?????????? ??? ??????? ??? ??????????.

42 ????? ????????, ?????????? ? ?????????? ??? ?? ?????? ?????? ?????? ??? ? ???????
????? ??????? ?? ?????? ?????? ??????????????? ???????????, ??? ?????? ?? ?????? ??? ??????? ??
«????????? ??? ?????????» ?????? ??? ?????????? ??? ?????????? ??? ?????????????? ??? ???????
????????????? ???????????????, ??? ???????????????, ?????? ?? ?? ?? ?????? ??? ???????
????? ??? ?????? ??? ?????? ??? . ? ?????????????????? ??? ?????????????? ??? ?????? ??? ???????
????????? ??? ?????? ??? ?????? ???????, ?????? ?? ???????
????????? ??? ?????? ????????

43 ??? ?????? ?????????? ??? ?????????? ??? ?????????? ??? ?????? ??? ?????????????? ???
??????, ?? ?????????? ??? ?????? ?????? ?????? ??? ? ?????????? ??? ?????????? ??? ?????????? ???
? ?????????? ??? ?????????? ?????????? ??? ?????? ??? ?????? ???????????????, ???
????????? ?????????????? ?????????? ??? ?????? ??? ?????? ??? ?????????? ??? ?????????? ??? ??? ??
????? ??? ?????? ?????????? ?????????? ??? ?????? ??? ?????? ??? ?????????? ??? ?????????? ???
????????????? (??., ?????? ????, ?????? ??? 22?? ??????? 2007, C-383/05, Talotta,
?????? 2007, ?. I?2555, ????? 19 ??? ????? ?????????? ???????, ??? ??????? ??? 16??
????????? 2008, C-527/06, Renneberg, ??????? 2008, ?. I?7735, ????? 59).

44 ?? ?????????? ??? ?????? ?????????? ???, ??? ?????????? ??? ?????????? ???
?????? ??? ?? ?????????? ??? ?????? ???????, ? ?????????? ??? ?????????? ??? ?????????? ???
????? ?????????? ??? ?????????? ??? ?????? ?? ?????????? ??? ?????? ??? ?????? ??? ??????
??? ??????? ???, ?????? ??? ?????????? ??? ?????? ?????????? ??? ?????? ?? ?????? ???
????????? ??? ?? ?????? ?? ?????? ?? ?????????? ?? ?????????? ?????????? ??? ?? ??? ??? ??
????????? ??? ?? ?????? ?????? (????????????? ?????? Talotta, ????? 19 ??? ???
????????? ???????, ??? Renneberg, ????? 60).

45 ?? ?????? ?????????? ??? ?????? ??? ? ?????? ??? ?????? ??? ?????????? ??? ?????????? ???
?? ?????????? ??? ?????? ??? ?????????? ??? ?????? ??? ?????????? ??? ?????? ???, ??? ??????
????? ?? ??? ??? ?????????? ????. ? ?????? ??? ?????? ?????? ?????? ??? ?????? ???
????????????? ??? ?????? ??? ?????????? ?????? ?????????? ??? ?????? ??? ?????? ???
????????????? ??? ?????? ??? ?????????? ?????? ??? ?????? ??? «????????? ???
?????».

46 ??? ? ?????? ??? ?????????? ?? ?????? ??? ?????? ?????? ?????????? ??? ?????????? ???
?? ??????, ????, ?? ?????? ???, ?? ?????? ???, ?????????? ??? ? ?????????? ??? ?? ??? ??
??????, ?? ?????? ?? ??? ?????? ??? ?????? ???, ?? ?? ?? ??? ?????? ?????????? ???
????????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ???.

47 ??? ??????, ??? ?????? ??? ?????? ??? ? ?????? ??? ?????????? ??? ?? ?? ?????? 39 ???
????????? ???, ?? ?????????? ??? ?????? ??? ?????? ??? ?????? ??? ?? ?????????? ??? ??????????
????????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ??????
????????? ???, ?? ?????? ??? ?????? ??? (??., ??' ????, ??????? ??? 12?? ??????? 2003,
C-234/01, Gerritse, ??????? 2003, ?. I-5933, ????? 27, ??? ??? 6?? ??????? 2006, C-346/04,
Conijn, ??????? 2006, ?. I-6137, ????? 20).

48 ??? ??? ??????? ???, ?????????? ? ?????? ??? ?????????????? ??? ? ??????
?????? ???, ??? ? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????????? ???
????? ??? ?????????? ??? ?????????????, ?????????????, ??? ?????? ??? ?????? ???
????????? ???, ??? «????????? ??? ??????» ??? ?????? ??? ???? ???? ???? ????
????????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ?????????? ??? ?????? ???
????????? ??? ?????? ??? ?????? ?????? ??? ?????? ?????? ?????? ??? ?????? ???
????????? ??? ?????? ?????? ?????? ??? ?????? ?????? ?????? ??? ?????? ???
????????? ??? ?????? ?????? ?????? . ??? ??????, ? ?????? ??? ?????? ???
????? ??? ?????? ??? ?????? ???, ??? ??? ?????? ??? ?????? 49 ???.

??? ??? ?????????? ??? ?????? ??? ??????????

49 ? ?????????? ??? ?????????????? ??? ?????? ??? ?????????? ??? ???? ????
????????? ??? ?????? ??? ?????????? ??? ?????? ??? ?????????? ??? ?????????? ???
?????????.

50 ?????? ?? ??????? ?????? ??? ?? ?????????? ?????? ??? ?????????? ???
????? ??? ?????????? ??? ?????? ?????? ?????? ?????? , ??? ?????? F. Gielen, ??
????????? ?? ?????? ?????? ??? ?????? ?????? ?????? ?????? ??? ?????????? ??????????
??? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ??????.

51 ?????? ?????? ?? ??????? ?????? ??? ?????? ??? ?????? ??? ?????? ?? ?????????? ??
????????? ?? ?????????? ?????? ??? ?????? ??? ?????? ??? ?????? ??? ?????? ???
?????????.

52 ???????????, ?? ??????? ??? ?????? ??? ?????? ??? ? ?????? ??? ?????? ??? ??
??????????, ? ??????? ?? ???, ??? ?????? ?????? ?????? ??? ? ?????? ??? ??????????
?? ?? ?????? 52 ??? ??????? ???, ?? ?????????? ??? ?????? ??? ?????? ??? ??????????
?? ?????? ???????, ??????, ?????? ?? ?? ?????? 49 ???, ??? ??? ?????? ???
?????????.

53 ??????, ??? ??? ?? ?????? ??? ?????? ??? ?????????? ?? ??????????, ??? ??????
????????? ??? ?????????? ??? ?????? ?????? ?????? ??? ?????? ??? ?????? ?????? ?? ??
????? ??? ??????, ??? ??? ?? ?????? ??? ?????? ?????? ?????? (??., ??' ????, ????)
?? 12?? ?????????? 2006, C-446/04, Test Claimants in the FII Group Litigation, ??????
2006, ?. I-11753, ??? 162).

54 ??? ???????, ?? ??????? ?????? ??? ?????? ??? ?????????? ?? ??????????, ???
????????? ??? ?????? ???, ??? ?????????????? ??? ?????? ?????? ?????????? ??? ??????
?? ?????????? ?? ?????????????? ??? ?????? ?????? ?????? ?????????? ??? ?????? ???
??? ?????? 48 ??? ??????.

55 ??? ?? ??????? ?????????? ??? ?????????? ??? ?????? 49 ??? ? ?????? ??????
?????, ??? ?????? ?? ??????? ??? ?????? ?????? ?????? ??? ?????? ??? ?????? ???
????? ??? ?????? ??? ?????? ?????? ?????? ?????????? ?????? ??? ?????? ??? ??????
????? ??? ?????????????? ??? ?????? ?????? ?????? ?????? ??? ?????? ??? ?? ??
????????? ??? ?????? ??? ?????? ???, ??? ?????? ??? ?????? ???, ??? ?????? ???
????? ??? ?????? ??? ?????? ??????.

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56 ?????????? ??? ? ?????? ?????? ?????????? ??? ?? ??? ?????? ?????? ??????
??? ?????????? ?????????????? ??? ?????? ?????? ??? ?????? ?????? ?????????? ?, ??

? ??????????? ?? ???????? ?? ???? ?????????? ??????. ?? ?????? ??? ?????? ??????????????
???? ??????? ?????????????? ??? ??????????, ??? ?????? ?? ??? ??????, ??? ???????????.

??? ??? ?????? ??????, ?? ?????????? (????? ????) ??????????:

? ?????????? ??? ???? **49** ??? ? ?????? ??????? ? ????, ??? ?????? ?? ??????
???? ?????????? ??? ?????? ??? ?????? ? ?????? ?????? ??? ?????? ??? ?????? ???
??? ?????????? ??? ????????????, ??? ?????? ?????? ?????? ??? ?????? ???
????????????? ??? ?????? ?????? ????????, ??? ??? ?? ?? ??????????????
????? ??????? ?? ??????????, ?? ?????? ?? ?? ?????? ???, ??? ?????? ??? ??
????? ??? ?????? ??? ?????? ??? ?????? ??????????? ?????????? ????

(?????????)

* ?????? ??????????: ? ???????.