OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 24 April 1991 *

Mr President,
Members of the Court,

1. Polysar Investments Netherlands B. V. (hereinafter 'Polysar'), a company incorporated under Netherlands law, is a member of the world-wide Polysar group. According to the order for reference, Polysar is not engaged in any 'trading activities' and acts exclusively as a holding company owning shares in a large number of foreign companies, which are engaged in the production and sale of synthetic rubber products and the like. Polysar is a wholly owned subsidiary of Polysar Holdings Limited, a holding company incorporated in Canada, itself a wholly owned subsidiary of Polysar Limited, which is also incorporated in Canada. The latter company's shares are in part listed on the Canadian Stock Exchange, and in part held by a number of banks and the Canada Development Corporation.

It is not unlikely that the reason for Polysar's incorporation in the Netherlands is what is known as the 'participation exemption'. In the Netherlands, profits from foreign holdings are in certain circumstances exempted from corporation tax if they have already been taxed abroad. This case, however, is concerned with the Community system applicable to turnover tax. It raises two questions: in the first place, whether a holding company whose activities are concerned solely with the holding of shares in subsidiary companies can be regarded as a 'taxable person' within the meaning of the Sixth Directive;[1] secondly, if a holding company can be regarded as a taxable person, whether the activities it carries on are to be regarded as services exempt from turnover tax and whether the company can rely, by virtue of those activities, on the right to deduct the value added tax it has paid.

2. The facts of the case may be summarized as follows: Polysar paid turnover tax in respect of certain services provided by advisers (including accountants). It requested and received a refund of the value added tax paid from 1981 to 1985 inclusive. However, the tax inspector subsequently issued to Polysar a notice of assessment to turnover tax, whose validity forms the subject-matter of this dispute.

3. The national court seeks a preliminary ruling on the following questions:

'1. (a) Must a holding company whose activities are concerned solely with

* Original language: Dutch.

1 — Sixth Council Directive 77/388/EEC (of 17 May 1977) on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1)

the holding of shares in subsidiary companies be regarded as a taxable person within the meaning of Articles 4 and 17 of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes?

(b) If not, is the holding company none the less a taxable person if it forms a link in and an integral part of a world-wide group of undertakings which in the main outwardly appears under a single name, the group name?

2. (a) If a holding company must be considered a taxable person, are the activities in which it engages as such transactions within the meaning of Article 13B(d)(5) of the directive, so that they must be considered to be services exempt from turnover tax and the turnover tax charged by third parties in this regard is not deductible?

(b) If the questions raised in 2(a) are answered in the affirmative, must the answer be different if the group of undertakings to which the holding company belongs provides, in accordance with Community criteria, exclusively services which are taxable within the meaning of the Sixth Directive?'

The term 'taxable person'

4. In answering Question 1(a), I wish to take as my point of departure the aim and characteristics of the common system of value added tax. The aim of the system established by the Sixth Directive has been explained by the Court on several occasions: it is to ensure that all economic activities are taxed in a wholly neutral way by the collection of a tax on consumption which is strictly proportionate to the price of the goods and services and which is chargeable only after deduction of the amount of the value added tax borne directly by the various components of the price of the goods and services; only taxable persons have the right to deduct value added tax already charged, hence the tax is ultimately borne by the final consumer. [2]

Article 4 of the Sixth Directive, which defines who is to be regarded as a 'taxable person', reads as follows:

'1 "Taxable person" shall mean any person who independently carries out in any place any economic activities 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

2 — See, for example, the Court's judgment of 14 February 1985 in Case 266/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655, paragraphs 16 to 19.

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.

. . . '

In conformity with the aim of the Sixth Directive to ensure a high degree of neutrality in taxation by means of a broad definition of the term 'taxable person',[3] the Court has repeatedly emphasized in its case-law that Article 4 of the directive confers a very wide scope on value added tax, comprising all stages of production, distribution and the provision of services.[4]

5. On the basis of the wording of Article 4 of the Sixth Directive and the wide interpretation which the Court has given of the term 'taxable person', there can be no doubt, according to Polysar, of its status as a taxable person on the ground that it carries on business independently and exploits property (in particular its holdings in subsidiary companies) for the purpose of obtaining income (in particular dividends) therefrom on a continuing basis.

Polysar's contention is based on the premise that the mere investment of financial resources in itself constitutes an 'economic activity' which, in my view, cannot be inferred from the case-law of the Court, in particular from the judgments in *Rompelman*[5] and *Van Tiem*.[6] Both judgments were concerned not only with an investment, that is to say the acquisition of property (in the former case, future title to an apartment, and in the latter, title to a building plot), but also with the property acquired subsequently being *made available* to a third party for consideration (in the former case by the letting of the apartment, and in the latter by the grant of building rights over the plot). The mere acquisition of a holding in a company does not entail making it available in that way. The dividends which may subsequently be payable to the shareholder are, in my view, not to be regarded as 'income . . . on a continuing basis' from the 'exploitation' of property; they are merely benefits which the owner may receive from property and which are yielded by the mere holding thereof. If a different view were taken, any holder of shares or securities would have to be regarded as a taxable person.

The position would be different only where a company engages in share transactions which go beyond the activities of a normal investor in connection with the usual management of his assets, for instance where a company regularly buys and sells shares as profit-making transactions. In such a case, repeated transactions which involve buying and selling may be regarded as economic activities. That situation does not arise, however, in the case of a holding company such as Polysar, which forms a 'link' in a group of companies and which

3 — See, for instance, the fifth recital in the preamble to the Sixth Directive

4 — See, most recently, the judgment in Case C-186/89 *Van Tiem* v *Staatssecretaris van Financien* [1990] ECR I-4363, with reference to the judgment in Case 235/85 *Commission* v *Netherlands* [1987] ECR 1485, at paragraph 7, and the judgment in Case 348/87 *Stichting Uitvoering Financiele Acties* v *Staatssecretaris van Financien* [1989] ECR 1737, at paragraph 10

5 — Cited in footnote 2

6 — Cited in footnote 4

has acquired shares in its subsidiaries with a view to retaining them.

6. The question remains whether liability to tax may be inferred from the other activities of a holding company. The national court has pointed out that Polysar's activities are concerned solely with the holding of shares in subsidiary companies. It seems to me that such activities, which are undertaken in the exercise of shareholders' rights, do not constitute 'economic activities' within the meaning of the directive. The exercise of those rights includes, for instance, participation in the general meeting of the subsidiary's shareholders, the exercise of the right to vote at the meeting and the possibility of influencing company policy thereby and, where appropriate, involvement in the decision appointing the company's directors or officers and/or apportioning the subsidiary's profits, as well as the receipt of any dividends declared by the subsidiary or the exercise of shareholders' preferential rights or options.

In addition to the aforesaid activities which a holding company carries on as a shareholder in other companies, there are activities which, like any other company, it carries on through its organs and which, in so far as they are conducted within the company (in its relations with the shareholders and the company's organs) also cannot be regarded as 'economic activities', within the meaning of the Sixth Directive. Those activities include the administration of the holding company, the making up of the annual accounts, the organization of the general meeting, the decision to spend the holding company's profits and to declare (and possibly pay out) dividends.

Nor, in my view, is there any question of economic activities independently carried on within the meaning of Article 4(1) of the Sixth Directive in the case of activities which the holding company, or persons acting in its name, carries out in its capacity as director or officer of a subsidiary company. A director or officer of the company does not act on his own behalf but only binds the (subsidiary) company whose instrument he is; in other words, where he acts in the exercise of his duties under the company instruments, there is no question of his acting 'independently'. In that regard, his actions must be equated with those of an employee who, as Article 4(4) of the Sixth Directive expressly states, does not act 'independently'.

7. The answer to Question 1(a) must therefore be that a holding company whose activities are concerned solely with the holding of shares in subsidiary companies and with the exercise of the rights connected therewith, or which do not go beyond the internal structure (of the holding or subsidiary company), does not carry on 'economic activities' within the meaning of Article 4(1) of the Sixth Directive and cannot therefore be regarded as a taxable person within the meaning of that directive.

8. Should the question be answered differently, the national court asks in Question 1(b), if the holding company forms a link in and an integral part of a world-wide group which in the main outwardly appears under a single name, the group name?

That question seems to be based on the wording of the second subparagraph of Article 4(4) of the Sixth Directive, whose wording is as follows:

'Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organizational links.' [7]

9. That provision allows two or more persons, though legally independent and thus capable of being regarded as separate taxable persons, to be treated as a single taxable person for the purposes of the application of the common system of value added tax where they are closely bound to one another by financial, economical and organizational links. The question which arises is whether that option enables a Member State to treat two persons who are closely bound to one another as a single taxable person where it is established that one of those persons does not engage in any 'economic activities' within the meaning of Article 4 of the directive. In my view, that question must be answered in the negative. I share the Commission's view that, in order to establish whether there is liability to tax, it is necessary to focus on the activities of each legal person separately, and not on the activities of the concern as a whole. The second subparagraph of Article 4(4) of the Sixth Directive does not derogate from that principle: it is a rule designed to simplify matters which enables the tax authorities to treat as a single person for the purposes of the application of value added tax two or more legally independent persons who engage in economic activities on their own account as a result of the close financial, economic and organizational links between them, with the result that transactions between the two do not give rise to the charging and payment of turnover tax.

It seems to me, however, that the aforesaid provision is not aimed at amending the conditions for liability to tax which are set out in Article 4(1) of the Sixth Directive. Furthermore, even if that were the aim of the second subparagraph of Article 4(4), that provision affects only persons who are established 'in the territory of the country', that is to say (as is clear, in particular, from Articles 3(1) and 7 of the directive) persons who are established in a single Member State only. [8]

The right to deduct tax

10. If we assume (as I did above) that a company like Polysar is not to be regarded as a taxable person, the second question becomes devoid of purpose since only taxable persons have the right to deduct tax.

7 — The 'consultations provided for in Article 29' means consultation of the Advisory Committee on value added tax. According to the observations of the Netherlands Government and the Commission, such consultation took place in the case of the Netherlands.

8 — It is apparent from the facts as set out in the order for reference that, apart from Polysar, the Polysar group has another two subsidiaries in the Netherlands. If the Court takes the view that a company like Polysar 'independently carries out ... any economic activity' within the meaning of Article 4 of the Sixth Directive, it is for the competent national authorities to establish whether Polysar is 'closely bound ... by financial, economic and organizational links' to those companies, so as to constitute a single unit for tax purposes.

Nevertheless, it may be useful, in my view, to consider Question 2. It follows from the system established by the Sixth Directive that a company like Polysar can acquire the status of a taxable person in a fairly simple manner, namely by engaging in a number of activities which are to be regarded as economic activities within the meaning of Article 4 of the Sixth Directive. For instance, Polysar could acquire the status of a taxable person by providing, for the benefit of other companies in the group, accounting or advisory services (which, as stated in paragraph 6 above, go beyond the normal exercise of duties which have by definition been entrusted to it under the company instruments in a subsidiary) or by granting loans to other companies in the group.

11. In Question 2(a) the national court seeks to ascertain whether the activities engaged in by a holding company 'as such' (and thus to the exclusion of other activities which, as I assumed in the previous paragraph, are carried out by Polysar and confer upon the latter the status of a taxable person) may be regarded as exempted activities within the meaning of Article 13B(d)(5) of the Sixth Directive.

To ensure a proper understanding of this question, I must begin with an account of the system established by the Sixth Directive in relation to the right to deduct tax. The general rule concerning the right to deduct tax is set out in Article 17(2) of the directive, and is as follows: a *taxable person* is entitled to deduct the value added tax he has paid in respect of goods and services supplied *if and in so far as* those goods and services are subsequently used for the purposes of *taxable* transactions. This means that transactions carried out without consideration do not confer a right to a deduction, since pursuant to Article 2 of the Sixth Directive, value added tax is charged only on the supply of goods and services effected for valuable consideration.[9] The same holds true in the case of (in principle taxable) activities which the directive exempts from value added tax.

A holding company like Polysar does not seem to me to carry on 'as such' (see above) any activities which may be regarded as taxable pursuant to Article 2 of the Sixth Directive (leaving aside the question, to be dealt with in paragraph 13 below, whether those activities, if they were taxable — which is not the case — are to be regarded as exempt). As I explained earlier, I consider that activities engaged in by a holding company as shareholder in, or director of, one or more subsidiaries or which form part of the company's internal operations, in particular in its relations with its own shareholder(s), are in no circumstances to be regarded as 'economic activities' within the meaning of Article 4 of the directive. Nor can such activities be regarded as falling within the scope of the rules on value added tax and thus taxable in principle, in other words as supplies of goods or services within the meaning of Article 2(1) of the Sixth Directive.

9 — See in that connection the judgment, given on the basis of the system established by the Second Directive, in Case 89/81 *Staatssecretaris van Financiën* v *Hong Kong Trade* [1982] ECR 1277, in which it was inferred from the fact that a person carries out transactions free of charge only (and does not therefore acquire any right to deduct tax) that that person is not a taxable person.

12. It follows from the foregoing that a holding company such as Polysar does not acquire, in respect of activities which it engages in as such, any right to deduct tax on the basis of the general rule in Article 17(2) of the directive, on the ground that it does not carry on any taxable activities.

However, there is an exception in Article 17(3)(c) to the general rule that tax may not be deducted. By way of exception, that provision confers on taxable persons (that is to say, on the assumption made here — see paragraph 10 above — on a holding company such as Polysar as well) a right to deduct tax in respect of a number of (in principle taxable but) *exempted* activities, provided the recipient is established outside the Community. They include the activities listed in Article 13B(d)(5) of the Sixth Directive, to which Question 2(a) relates.

I consider that Polysar is equally unable to exercise this specific right of deduction in respect of the activities which it engages in as such, that is to say as a holding company, for the same reasons, namely that those activities do not constitute economic activities within the meaning of Article 4(1) of the Sixth Directive and therefore are not in principle taxable (or, consequently, exempted) either.

13. In case the Court nevertheless considers that the activities which a holding company like Polysar carries on as such are to be regarded in principle as taxable, I must examine whether those activities are capable of falling within the scope of Article 13B(d)(5) (or, more generally, within subparagraph (d], referred to in Question 2(a), and whether in that case such activities can confer a specific right to deduct tax pursuant to Article 17(3)(c).

I do not believe that, even in those circumstances, Article 13B(d) can be applied to the activities of a holding company such as Polysar. More specifically, it seems to me that the exemption contained in Article 13B(d)(3) in respect of 'transactions, including negotiation, concerning deposit and current accounts, payments, transfers . . .' does not apply to payments made within a company (such as, for instance, the paying out of a dividend by the holding company to its shareholder(s)). The same holds true as regards the exemption provided for in Article 13B(d)(5) in respect of 'transactions . . . in shares', which in my view bears no relation to the exercise by the shareholder of the rights attaching to his shares. [10] Nor can the latter activity be regarded as falling within the expression 'management and safekeeping' (which is excluded from the exemption in Article 13B(d)(5) and thus constitutes a taxable activity), which in my view relates to the management and safekeeping of *another's* shares. [11]

10 — That is also borne out by the French and Italian versions of the directive, which refer to 'opérations . . . portant sur les actions' and 'operazioni . . . relative ad azioni'.

11 — For the same view, see D. Wachweger and Others 'Die 6. EG-Richtlinie zur Harmonisierung der Umsatzsteuer, 3. Teil: Artikel 13 bis 16', *Umsatzsteuer-Rundschau 1977*, No 8, p. 141, at pp. 146-147.

Furthermore, even on the assumption that the aforesaid activities are taxable activities which fall within the exemption in Article 13B(d), I do not believe they can confer a special right to deduct tax pursuant to Article 17(3)(c). That special right arises only where the goods and services in respect of which value added tax has been paid 'are used', in the terms of the first sentence of Article 17(3), for the purposes of activities which are exempt. It seems to me that, since the special right to a deduction conferred by Article 17(3)(c) is of an exceptional nature, that requirement must be interpreted in such a way that the right to a deduction is available only where and in so far as the goods and services are used *directly* for the purposes of one of the activities listed in Article 13B(d). A different interpretation would lead to complex problems of chargeability and carry an obvious risk of abuse.

14. I shall be brief in my observations on Question 2(b). The answer to that question follows from what I have already said in connection with Question 1(b). The second subparagraph of Article 4(4) of the Sixth Directive gives Member States the possibility in certain cases of treating as a single taxable person two or more legally independent persons who carry on economic activities on their own account. However, that option does not have the effect of widening, in one way or the other, the general or exceptional rules on deduction considered above.

Conclusion

15. In the light of the foregoing considerations, I propose that the Court should answer the questions submitted for a preliminary ruling as follows:

'*Question 1(a)*

A holding company whose activities are concerned solely with the holding of shares in subsidiary companies and with the exercise of the rights which are connected therewith, or which do not go beyond the company's internal structure, cannot be regarded as a taxable person within the meaning of the Sixth Directive.

Question 2(a)

If, however, a holding company is to be regarded as a taxable person on account of activities other than those referred to in the answer to Question 1(a), the ac-

tivities referred to in the answer to Question 1(a) are still not taxable within the meaning of Article 17(2) of the Sixth Directive and do not fall within the exemptions provided for in Article 13B(d). Nor do such activities confer a special right to a deduction pursuant to Article 17(3) of the Sixth Directive.

Questions 1(b) and 2(b)

For the purposes of the answer to Questions 1(a) and 2(a), the fact that the holding company forms an integral part of a world-wide group which in the main outwardly appears under a single name, the group name, and in which other companies are to be regarded as taxable persons providing taxable services is immaterial.'