OPINION OF ADVOCATE GENERAL F. G. JACOBS delivered on 3 March 1993 *

My Lords,

1. In this case the Hoge Raad der Nederlanden seeks a ruling on the interpretation of the Sixth VAT Directive (Council Directive 77/388/EEC; OJ 1977 L 145, p. 1). The issue in the case is whether, where a builder concludes a contract with a customer for the supply of land and construction of a building, interest payable by the customer on account of the deferment of payment of the purchase price of the land until the date when the legal title is transferred constitutes part of the taxable consideration for the supply of the land, or consideration for a separate supply of credit exempt from VAT under Article 13(B)(d)(1) of the Sixth Directive.

2. Article 13(B) of the Sixth Directive provides as follows:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(d) ...

1. the granting and the negotiation of credit and the management of credit by the person granting it.'

3. The appellant in the main proceedings, Muys' en De Winter's Bouw-en Aannemingsbedrijf BV, is a building firm in Rotterdam which, in the course of its business, enters into 'purchase and construction agreements' with customers. It appears from the Order for Reference that the agreements provide either:

for the supply of a plot of land and the construction of a dwelling (or in some cases the completion of a partly constructed dwelling); or

for the construction of a building subdivided into apartments, and the supply to the customer of a share in the building and the accompanying land, together with the right to the exclusive use of part of the building as a dwelling.

4. Under the agreements, the price of the construction of the building is payable by

* Original language: English.

instalments, which fall due according to the progress of the construction. The price of the land is normally payable upon conclusion of the agreement or shortly thereafter, although it is sometimes payable in instalments together with the construction price. The agreements allow the customer to defer payment of the amount due for the land, or of the instalments making up that amount, until the date of the transfer to the customer of the legal title to the land and building, provided generally that the customer pays a deposit of 10% of the total purchase and construction price. In such cases the customer must pay interest on the amount deferred. The arrangements regarding deferred payment and interest also apply to the instalments payable in respect of the construction price.

5. The Netherlands tax authorities take the view that, although the interest payable in respect of the overdue instalments of the construction price qualifies for exemption under the Netherlands provisions implementing Article 13(B)(d)(1), the interest payable in respect of the purchase price of the land does not. From the explanation given by the Agent of the Netherlands Government at the hearing it seems that the distinction made is based on the fact that the construction work involves the performance of services throughout the period of the contract whereas the supply of the land is a single transaction occurring on completion of the building. The tax authorities' view was upheld at first instance, on the ground that in the circumstances of this particular case the interest charged between the conclusion of the agreement and the transfer of the land formed part of the consideration charged for the land. On appeal the Hoge Raad has put the following question to the Court:

'Where a purchase and construction agreement between a building contractor and a buyer provides that payment for the supply of the land pursuant to the agreement must be made on or shortly after conclusion of the agreement, but may be deferred to the time of the supply on payment of interest, is that interest to be regarded as being in the nature of consideration for a loan, as provided for in Article 13(B)(d)(1) of the Sixth Directive, or is that interest part of the payment for the supply of the land?'

6. The Hoge Raad's question raises two main issues:

(1) As a matter of principle, where a supplier of goods allows his customer to defer payment of the purchase price of the goods in return for the payment of interest, can he be regarded as making a separate supply consisting in the grant of credit exempted under Article 13(B)(d)(1) of the Sixth Directive?

(2) If so, does it make any difference if, as in this case, the supplier purports to grant the credit before he supplies the goods to the customer?

The first issue

7. With respect to the first issue, the appellant and the Danish, German and Nether-

lands Governments consider that Article 13(B)(d)(1) does apply in principle to the grant of credit by a supplier to his customer in connection with a supply of goods such as land (which as tangible property falls to be classified as goods for the purposes of Article 5 of the Directive). The Danish and German Governments emphasize that a clear contractual distinction must be made between the main supply and the credit transaction if the latter is not to be regarded as incidental to, and forming part of, the main transaction; thus, the German rules require that the consideration for the two transactions should be separately agreed and accounted for and the annual interest rate specified; the Danish rules similarly require the interest element to be clearly identified in the contract for sale itself or in a separate schedule concerning payment.

8. The Commission and the Greek Government, on the other hand, take the view that Article 13(B)(d)(1) does not apply to the grant of credit in connection with a contract for the supply of goods or services. The Commission considers that Article 13(B)(d)(1) only covers interest on loans *stricto sensu* and not interest on credit which is incidental to the supply of goods or services; in its view the purpose of the provision is to exempt the banking sector. The Greek Government considers that there must be a separate loan agreement in order for the exemption to apply.

9. As exceptions to the general scheme of the Sixth Directive the exemptions provided for by Article 13 fall to be construed strictly: see for example the Court's judgment in Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, in particular paragraph 13. The exemptions in Article 13 are for the most part closely defined in terms of the nature of the supplies and often the identity of the supplier or recipient. The Court has paid particular attention to this. Thus, for example, in Case 107/84 *Commission* v *Germany* [1985] ECR 2655 the Court held that the exemption in Article 13(A)(1)(a) relating to the supply of services by 'the public postal services' applied only to services provided directly by the public postal authority and did not extend to the activities performed under statute by transport undertakings on behalf of that authority.

10. However, Article 13(B)(d)(1), which exempts 'the granting of credit and the negotiation of credit and the management of credit by the person granting it', does not specify the identity of the lender or the borrower. It merely defines the nature of the exempt transaction. Whilst it seems likely that, as the Commission suggests, the exemption was primarily intended to apply to loans and credit granted by banking and financial institutions, its wording provides no basis for restricting its scope solely to such transactions. I therefore agree with the appellant and the Danish, German and Netherlands Governments that the term 'granting of credit' is sufficiently broad to encompass credit granted by a supplier of goods in the form of deferment of payment. Moreover, there is no economic justification for excluding credit granted by suppliers from the scope of the exemption. It has become a widespread practice of suppliers to make their own financing arrangements, and a limitation of the exemption would lead to distortion of trade and of competition. There is

no reason why a customer should be charged tax on credit granted by his supplier but receive an exempt supply of credit if instead he has recourse to finance from a bank or other lender. From the viewpoint of the customer, both arrangements involve the grant of credit; a customer is unlikely to view the interest which he pays to his supplier as part of the price of the goods or services any more than if he finances his purchase by means of a bank loan.

11. I see no merit in requiring that the credit should be granted under a special loan agreement which is independent of any contract for the supply of goods or by a person other than the supplier of the goods. The fragility of such requirements is demonstrated by the fact that a supplier might in any event be able, without altering the substance of a transaction, to draw up a separate loan agreement or provide credit through a separate finance company set up for that purpose. One consequence of this would be to discriminate unfairly between firms which have sufficient resources or trade to set up an independent finance company and firms which do not. That would hardly be consistent with the fundamental principle of neutrality.

12. I do, however, agree with the Danish and German Governments that the contractual arrangements and terms must be such that the credit transaction is clearly dissociable from the main supply of goods. Although it seems unnecessary to consider this point in detail in the present case, I think that requirement would generally be satisfied where, for example, a contract for the supply of goods contained one or more specific clauses offering the customer a credit facility and setting out in full the terms on which the credit was granted, including a specified rate of interest. As the German Government points out, by virtue of the introductory words of Article 13(B) Member States may lay down any further conditions that are necessary to ensure the correct and straightforward application of the exemption and to prevent evasion, avoidance or abuse. This may be of particular importance in the case of transactions between connected parties who might seek artificially to convert the consideration for a taxable supply of goods or services into consideration for an exempt grant of credit by inflating the interest rate; this is much less likely to occur in the case of an arm's length transaction. Like the German Government, I consider that the risk of evasion or abuse may be satisfactorily counteracted by suitable measures adopted by the Member States and does not justify an across-the-board inclusion of credit interest in the taxable amount as suggested by the Commission.

13. In its written observations the Commission referred to two judgments of the Court in support of its view that interest payments in respect of credit granted by a supplier of goods form part of the taxable consideration for the goods. The first of those is the judgment in Case 222/81 *Bausystem* v *Finanzamt München für Körperschaften* [1982] ECR 2527. In that case the Court held that statutory interest awarded to an undertaking by a court in respect of an unpaid debt for

services rendered did not constitute consideration for those services for the purposes of the Second Council Directive on VAT (OJ, English Special Edition 1967, p. 16). The Commission points out that in the body of its judgment the Court emphasized that the undertaking in question was compelled to agree to a delay in payment not provided for in the contract and that the interest did not constitute the consideration for a commercial transaction, but was fixed by a court pursuant to the relevant provisions of German commercial law and was only remotely connected with the main services provided. The Commission concludes, by a process of *a contrario* reasoning, that interest paid pursuant to a contract for the supply of goods forms part of the consideration for the goods. It seems to me, however, that the Court's words were directed towards explaining why the statutory interest in question could not form part of the taxable amount for the services rendered; the Court did not rule out the possibility that a taxable person supplying goods or services might, if he so wished, provide a wholly distinct service to his customers consisting in the grant of credit in return for the payment of interest.

14. The Commission refers secondly to the judgment in Case 126/78 *Nederlandse Spoorwegen* v *Staatssecretaris van Financiën* [1979] ECR 2041. In that case the Court held that a cash-collection service undertaken by a transport company when delivering goods to consignees was a service ancillary to transport within the meaning of Annex B, item 5, of the Second Directive and hence, like the transport service, was compulsorily taxable under Article 6 of that Directive. That judgment is, however, only of apparent relevance to this case. The issue was not whether the consideration for the collection service should be treated as part of the consideration for the transport service. The issue was whether the collection service, which was acknowledged to be a separate service, was so inextricably linked to the transport service that it was to be regarded as 'ancillary' to it for the purposes of Annex B, item 5 of the Second Directive and hence as falling into the category of services which were compulsorily taxable.

15. The Commission contends further that it may be concluded from Article 11(A)(3)(a), which provides that the taxable amount does not include 'price reductions by way of discount for early payment', that price supplements in respect of deferred payment must be included in the taxable amount. It seems to me that Article 11(A)(3)(a) does no more than clarify the application of the general rule in Article 11(A)(1)(a), according to which the taxable amount is the consideration received or to be received for the supply. Let us suppose, for example, that a taxable person makes a supply of goods to a customer on terms whereby the customer is granted a discount if he pays for the goods within thirty days of the date of the invoice. If the customer takes advantage of the discount, the taxable amount is the purchase price less the discount. If, on the other hand, he does not make the payment within the thirty-day period and is obliged to pay the

full invoice price of the goods, the consideration received or to be received, as measured at the moment when the chargeable event occurs under Article 10(2), is the full price of the goods. However, that situation is quite different from one in which a taxable person who supplies goods or services makes a contractually distinct grant of credit in respect of all or part of the purchase price for a certain period and at a specified interest rate. The interest then constitutes consideration for a separate supply of credit.

16. Finally on this first issue, I do not consider that interest on credit falls within the term 'incidental expenses' which are included in the taxable amount by virtue of Article 11(A)(2)(b) of the Sixth Directive. The expenses mentioned in that provision, such as those relating to commission, packing, transport and insurance, are costs which are inextricably linked to the sale and transport of goods to the customer. There is no such link in the case of interest on credit granted by a supplier, which is an optional service offered in addition to the supply of goods.

The second issue

17. I now turn to the second issue, namely whether it is possible for there to be a grant of credit consisting in deferment of payment of the purchase price of goods before the goods have been supplied.

18. Before considering this issue, I should point out that the Hoge Raad's question has been put to the Court on the basis that no supply of goods (i. e. of the land) within the meaning of Article 5(1) of the Directive occurs at the moment when the builder concludes the building contracts with its customers. I accordingly propose to answer the question on the basis that the supply takes place when the building is completed and the legal title transferred to the customer.

19. The appellant takes the view that the parties to a contract for the supply of goods are entitled to agree that the purchase price is wholly or partly payable at a date before the goods are supplied. It is at that date that the right to demand payment arises under the Netherlands civil law. By allowing the customer to defer payment until the date of the supply the supplier therefore makes a grant of credit to the customer.

20. The Netherlands Government, on the other hand, considers that there is no genuine grant of credit in circumstances such as those of the present case, where the purchase price is payable before the supply is made but payment may be, and in practice invariably is, deferred until the supply is actually made. The Spanish Government shares the Netherlands Government's view. It observes that the chargeable event arises and the tax becomes chargeable when the land and building are finally supplied and the customer pays the purchase price. It is at that moment that the chargeable event occurs under Article 10(2) and the taxable amount

falls to be determined under Article 11(1)(a). Since the interest is a component of the total price payable at that point, it forms part of the taxable consideration for the supply of the land and building.

21. In my opinion the solution proposed by the Netherlands and Spanish Governments is correct. Whilst in principle the moment at which credit is granted by a supplier of goods must be determined by reference to the date at which the purchase price would otherwise become payable in national law, that is to say, normally, the date specified in the contract, it would be inconsistent with the wording and scheme of the Sixth Directive to extend that rule to credit which a supplier purports to grant before the supply of the goods in question takes place.

22. The first subparagraph of Article 10(2) of the Directive provides *inter alia* that:

'The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed.'

It is at that moment, therefore, that the taxable amount falls to be determined under Article 11(A)(1)(a) of the Directive. By virtue of that provision the taxable amount is:

'everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party ...'.

The Directive thus ensures that VAT is imposed on the full value of goods or services determined at the moment when they are supplied.

23. In the case of a normal credit sale where, for example, a taxable person supplies goods to a customer on terms allowing payment of the purchase price to be deferred for up to six months after the date of the supply in return for the payment of interest, the taxable amount, determined at the moment when the goods are supplied, is the purchase price of the goods. Tax becomes chargeable on the supply of goods at that moment. If the customer takes advantage of the supplier's offer of credit, the interest received by the supplier constitutes consideration for a separate supply of credit which takes place subsequently to the supply of goods and must be excluded from the taxable value of the goods as determined at the moment when they are supplied.

24. The peculiar feature of the present case is that the builder purports to grant credit in respect of an instalment of the purchase price (corresponding to the price of the land) payable before the supply is made and hence before the chargeable event occurs under the first subparagraph of Article 10(2). It seems to me that in such circumstances the full value of the goods at the moment when they are supplied must be taken to include any finance costs incurred by the supplier up to the moment when the supply is made which the supplier passes on to the customer, even

if he purports in the contract to pass them on as interest charges distinct from the purchase price of the goods. In this respect finance costs are no different from any other overheads incurred by the supplier up to the moment of the supply and passed on in the price of the goods.

25. The situation in the present case is in substance no different from one in which a builder refrains from demanding any payments on account and finances the construction himself or by means of a bank loan. In such a case he would be obliged to take account of his finance costs in fixing the taxable purchase price of the completed building.

26. The appellant and the German Government have pointed out that in the present case the customer could obtain an exempt loan from a bank to make the payment on account in respect of the land. Although in economic terms the customer would then be providing a benefit to the builder in the form of an interest-free loan, under the Sixth Directive that benefit would not treated as additional consideration and included in the taxable amount. However — and this is the essential difference — the moment when tax is charged would be brought forward to the date when the payment on account is made. Thus, the second subparagraph of Article 10(2) provides:

'However, where a payment is to be made on account before the goods are delivered or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.'

If the customer obtained a loan from a third party, the portion of the supply represented by the payment on account (i. e. the land) would thus be valued and taxed immediately. It is therefore inappropriate to compare such a case with the case where the builder allows the customer to defer the payment on account, since in the latter case there is no immediate tax charge and the relevant portion of the supply falls to be valued and taxed in the normal manner at the moment when the supply is made. Its value must therefore be taken to include the finance costs passed on to the customer at that point. For VAT purposes there can be no deemed payment on account in advance of a supply of goods. Either there is an actual payment triggering an immediate charge to tax under the second subparagraph of Article 10(2); or there is no payment on account and the chargeable event occurs when the goods are finally supplied, in which case the full value of the goods, including any finance costs, falls to be taxed at that moment. There can be no half-way house whereby the taxable person has the benefit of both the exemption under Article 13(B)(d)(1) and postponement of the tax charge to the moment when the supply is made.

27. The contrary view would enable traders and their clients, by means of a fictitious grant of credit, to avoid paying VAT on part of the price of goods or services in transactions where there is a delay between contract and supply. This point perhaps becomes

easier to appreciate if a more typical supply of goods is considered. Suppose, for example, that a carpenter agrees to supply made-to-measure furniture to someone in 12 months' time, for a price of ECU 11 000. Let us suppose however that they stipulate in their contract that the price for the goods is ECU 10 000 payable immediately, but that payment may be deferred until the date of delivery, subject to an interest charge of 10% per annum. When the furniture is delivered 12 months later the customer pays ECU 11 000. It is difficult to see any reason why the taxable amount should be anything other than ECU 11 000. To pretend that the consideration paid for the furniture is ECU 10 000 and that the remaining ECU 1 000 is interest on an exempt supply of credit would be to close one's eyes to the obvious reality of the transaction.

28. Finally, I do not find convincing the explanation given by the Netherlands Government at the hearing concerning the distinction drawn by the tax authorities between the purchase price of the land and the instalments of the construction price. If, as I have assumed (paragraph 18 above), the land was not supplied to the customer until the building was completed, then no services can have been provided for the customer during the period of the contract. There would be a single supply of goods, namely the land and buildings, on completion of the construction. On that analysis interest payments on credit purportedly granted in respect of instalments of the construction price would fall to be included in the taxable amount for the land and the building. The position would be different if the land were supplied to the customer upon conclusion of the contract. Unless the Member State concerned chose to treat the construction work as a supply of goods pursuant to Article 5(5)(b) of the Directive, the builder would provide construction services to the customer on the latter's land. It would then be possible to take the view that, following the taxable supply of land on conclusion of the contract, a series of taxable supplies of services takes place throughout the progress of the construction. Interest on credit granted by the builder in respect of the land and the construction price could then be regarded as consideration for a series of separate supplies of credit granted after each supply of goods or services.

Conclusion

29. I am accordingly of the opinion that the question put by the Hoge Raad should be answered as follows:

(1) Where a taxable person who supplies goods or services to a customer makes a separate grant of credit to that customer on terms which clearly distinguish between the supply of goods or services and the credit transaction, the grant of credit constitutes a separate transaction which is in principle exempt under Article 13(B)(d)(1) of the Sixth Directive.

(2) However, where a purchase and construction agreement between a building contractor and a purchaser provides that payment for the supply of the land must be made on or shortly after conclusion of the agreement but may be deferred to the time of the supply in return for the payment of interest, such interest does not constitute consideration for a separate supply of credit but must be regarded as part of the consideration for the supply of the land for the purposes of Article 11(A)(1)(a) of the Directive.