OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 6 March 2001 [1]

I — Introduction

1. In the present case, the tribunal administratif de Lille (Administrative Court, Lille) has referred to the Court the question of the extent to which, under the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (hereinafter 'the Sixth Directive'), [2] a holding company is entitled to deduct the input tax on costs which it has incurred in the course of acquiring stakes in undertakings.

II — Facts and main proceedings

2. The applicant in the main proceedings, the public limited company Cibo Participations (hereinafter 'Cibo'), is a holding company. It was founded by its majority shareholder, Compagnie d'importation des laines, which intended to create a coherent group of complementary undertakings in the wool sector by acquiring stakes in undertakings.

3. At the root of the proceedings before the national court lies a demand sent to Cibo for the payment of additional VAT, resulting from the tax authorities' refusal to allow it to deduct input tax for the period from 2 November 1993 to 31 December 1994 charged on the supply of various services, for which it was invoiced by third parties, in connection with the acquisition of stakes in undertakings, such as the auditing of businesses, negotiations as to price, the mounting of the takeover of companies, legal and tax services and the acquisition of shares in the capital of companies. For its services, Cibo received a flat rate of 0.5% of the turnover of its subsidiaries.

4. The French tax authorities pointed out that Cibo derived most of its turnover from dividend income (in 1993 and 1994, 99.32% and 92.07% respectively of total receipts), while the rest consisted of fees for the services it provided to its subsidiaries. The holding company did not have any

1 — Original language: German.
2 — OJ 1977 L 145, p. 1.

turnover from carrying out economic activities in its own name.

5. By its judgment of 6 January 2000, the tribunal administratif de Lille decided to refer to the Court of Justice for a preliminary ruling the following three questions concerning the requirements to be met for a deduction of input tax under the Sixth Directive:

'1. What are the criteria for establishing "involvement"? Can it be inferred from the provision of paid services or the running of a group of companies by its holding company, or *de facto* management precluding independence on the part of the subsidiary, or some other factor?

2. Where there is "involvement", does the receipt of dividends remain outside the scope of value added tax for any reason other than economic activity, in that such receipts are not the consideration for the supply of goods or services, or, having regard to the fact that expenditure is incurred in connection with the acquisition of shares the direct purpose of which is to enable participation in economic activity, do dividend receipts fall within the scope of value added tax and, if so, are they exempt under Article 13B(d)(1) of the Sixth Directive or taxable?

3. If the receipt of dividends does remain outside the scope of value added tax, what are the implications for the right to deduct:

— does no right remain to deduct tax on expenditure incurred in acquiring shares, given that that expenditure does not relate to a taxable transaction,

— or is deduction allowed under the heading of general costs?'

III — Legal framework

6. Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to VAT.

Under Article 4(1), 'taxable person' means 'any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.' Under Article 4(2),

'economic activities' comprise all activities of producers, traders and persons supplying services as well as, '[t]he exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis'.

Article 13B provides that specified activities are to be exempted from VAT. Under Article 13B(d)(5), these include 'transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding documents establishing title to goods [and] the rights or securities referred to in Article 5(3)'.

Article 17 regulates the origin and scope of the right to deduct. Under Article 17(2), a taxable person is entitled to make a deduction only in respect of expenditure on goods and services used for the purposes of his taxable transactions, in the amount of the value added tax due or paid in respect of goods and services supplied to him by another taxable person.

Article 17(5) lays down how to deal with deductions for goods and services that are used not only for transactions granting the right to deduct but also for transactions that do not give rise to such a right. Subparagraph 1 of Article 17(5) provides that 'as regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions'. Under subparagraph 2, this proportion is to 'be determined, in accordance with Article 19, for all the transactions carried out by the taxable person'.

Article 19 governs the calculation of the deductible proportion. Under Article 19(1), the proportion is a fraction that has as its numerator the total amount of turnover attributable to transactions in respect of which VAT is deductible. The denominator is the sum of the numerator and the turnover attributable to transactions in respect of which VAT is not deductible. VAT is to be deducted from turnover both times in this calculation.

Article 19(2) provides by way of derogation from Article 19(1) that certain turnover is to be left out of account, such as turnover attributable to transactions specified in Article 13B(d) in so far as they are incidental transactions.

IV — The first question

7. By its first question, the national court asks what criteria must be satisfied for there to be 'involvement' of a holding company in the management of its subsidiaries.

Arguments of the parties

8. Referring to Articles 4 and 13 of the Sixth Directive, Cibo states that these provisions clearly distinguish between activities in the sense of 'economic activities' and other activities, and that this is decisive for the question of the right to deduct.

Cibo also refers to a series of judgments in which the Court has ruled on the question of the classification of a holding company. [3] It is clear from this case-law that, in principle, a holding company does not carry out any economic activity and is therefore not a taxable person, unless it involves itself in the management of its subsidiaries. However, the Court has hitherto not defined the concept of 'involvement'. Cibo submits that in this connection the concept of '*de facto* management' should not be a criterion. Under French law, this is applied to persons who actually run an undertaking but not to those who are merely entitled to run it as a matter of law.

Even if *de facto* management displays in effect all the features of 'involvement', it represents only the final stage of such 'involvement', especially as it can result in the loss of the separate legal personality of the subsidiary. In Cibo's view, an investor can find himself in different situations depending on the purpose and extent of his acquisition of shares.

In this connection, the following two forms of equity participation entailing 'involvement' correspond to the concept, referred to in the question of the national court, of 'running a group of companies', which is applied as a criterion in French tax law in the field of wealth tax (l'impôt de solidarité sur la fortune): [4]

— The first form covers the case in which the shareholding amounts to practically the whole share capital and the shareholder actively participates in running the business, thereby involving itself in its management. This generally

3 — Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111, paragraphs 13 and 14; Case C-333/91 *Sofitam* [1993] ECR I-3513, paragraph 12; Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 35; and Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraphs 15 and 16.

4 — Under this criterion, holding companies that restrict themselves to the standard exercise of shareholder rights are distinguished from those that in effect run their group, participate actively in the management and control of their subsidiaries and supply them with various services, in particular administrative and legal services.

results in the shareholder providing various services to the subsidiary undertakings in return for a fee.

— The second form corresponds to the case of the most extensive shareholding, namely where the shareholder is in complete control of the subsidiary undertaking and 'involves' itself in its running as its *de facto* manager.

In both these cases, the acquisition of shares is an economic activity within the scope of the Sixth Directive, because it is possible, in fact or in law, for the holding company to involve itself in the management of its subsidiary undertakings to a greater extent than usual shareholder rights would permit.

9. The French Government states first of all that, in its opinion, it is to be inferred *a contrario* from the Court's settled case-law that the acquisition, ownership and transfer of shares as well as the receipt of dividends fall within Article 4(2) of the Sixth Directive if those activities are accompanied by direct or indirect involvement in the management of the companies whose shares they are. 'Involvement' means a decisive influence on the management of the undertaking in question. Influence on an undertaking's management sufficient to amount to 'involvement' may be presumed where the holding company in fact or in law has a majority of the voting rights in the undertaking. Such influence can also be inferred from various features of the legal, financial, administrative and company relationships between the holding and subsidiary companies, such as control of decisions, similarity of business objectives, appointment of management personnel and provision of services in return for a fee.

10. The Commission refers to the case of *Floridiennne*, [5] which was still pending at the time of its written observations, and to the Opinion in that case of Advocate General Fennelly, who did not define the 'concept of involvement' as such, but examined whether or not the holding company itself carried out economic activities.

According to the Commission, the present question is not to be answered by praying in aid a particular concept of 'involvement' alien to the Sixth Directive — a matter upon which it therefore expresses its view in the alternative only — but by assessing the activities in question in the light of Article 4 of the Sixth Directive in conjunction with Article 2.

On the definition of 'involvement', the Commission notes with regard to the

5 — Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567.

case-law of the Court, first, that *Polysar*[6] concerned a pure holding company, whereas in the present case the holding company is mixed, not only managing its shareholdings but also providing further services to its subsidiaries in return for a fee. It follows that, in answering the present question, it is necessary precisely to define the point from which the holding company no longer acts merely as the owner of shares but carries out an economic activity. As regards activities that are linked to the mere exercise of the rights of a shareholder and cannot amount to 'involvement' in management, the Commission refers to the activities listed by Advocate General Van Gerven in point 6 of his Opinion in *Polysar*.[7]

As to the issue of what might be included in the concept of 'involvement', the Commission points out that, in the judgment in *Wellcome Trust*, having a majority shareholding appears to have been regarded as a decisive factor in favour of 'involvement'. However, the judgment in *Polysar*, which concerned a wholly-owned subsidiary, gainsays this view.

The Commission concludes that it is very difficult to reconcile the concept of 'involvement' with the exercise of an economic activity within the meaning of the Sixth Directive. The real problem to be solved in the case of mixed holding companies is to determine the type of activity to which an expense must relate. Once the activities outside the scope of the Sixth Directive are identified, it is necessary, as regards activities falling within its scope, only to distinguish between exempt and taxable transactions when calculating the deductible proportion.

Assessment

11. It follows from paragraph 19 of the judgment in *Floridienne*[8] that 'involvement... in the management of subsidiaries must be regarded as an economic activity within the meaning of Article 4(2) of the Sixth Directive, in so far as it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that Directive, such as the supply... of administrative, accounting and information technology services' by the holding company to its subsidiaries.

Therefore, the only criterion for determining whether a holding company is taxable is whether it carries out activities within Article 2 or economic activities under Article 4(2) of the Sixth Directive.

6 — Cited in footnote 3.

7 — Cited in footnote 3; see p. I-3126.

8 — Cited in footnote 5.

12. It follows that a pure holding company, whose activity is limited to the acquisition and holding of shares in companies and the exercise of the shareholder rights that thereby accrue to it, cannot become a taxable person under the Sixth Directive by virtue of any influence, in whatsoever form, it exercises over its subsidiaries. Thus, whether a holding company is taxable cannot depend on whether it leads the group of companies or influences its management, nor on whether it has a controlling influence on the management of the undertaking.

13. Therefore, the arguments of Cibo and of the Commission are to be accepted in so far as the distinction between economic activities within the meaning of Article 4(2) of the Sixth Directive and activities that are not economic ones in that sense is decisive for the question of the right to deduct input tax. The right to deduct is only available to a taxable person, and Article 4(1) provides that this status depends in turn on the exercise of economic activities under Article 4(2).

14. It must accordingly be examined, first, whether Cibo carries out economic activities which qualify it as a taxable person and which then entitle it, depending on the circumstances, to deduct input tax.

15. As the Commission rightly points out, the Court considered this question in *Floridienne*.

In paragraph 17 of the judgment, it was observed first that, in accordance with the Court's settled case-law, a holding company whose sole purpose is to acquire holdings in other undertakings and does not 'involve' itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not acquire the status of taxable person and has no right to deduct tax under Article 17 of the Sixth Directive. That conclusion is based on the fact that the mere acquisition of financial holdings in other companies does not constitute an economic activity within the meaning of the Sixth Directive. [9]

As was stated in paragraph 18 of the judgment, referring to the judgment in *Polysar*, it is otherwise where the holding 'is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company as shareholder'.

9 — The Court refers in this connection to *Polysar*, cited in footnote 3, paragraph 17, and *Sofitam*, cited in footnote 3, paragraph 12.

The forms of 'involvement' in the management of subsidiaries that are listed in paragraph 19 of the judgment in *Floridienne* include examples of activities for the purposes of Article 2 of the Sixth Directive. In theory, any economic activity within the meaning of Article 4(2) of the Sixth Directive may, in so far as it entails carrying out transactions subject to VAT by virtue of Article 2 of the Sixth Directive, be 'involvement'.

16. Therefore, where a holding company does not just own shares, but in addition provides services to its subsidiaries in return for a fee — in which case it is *ex hypothesi* a mixed holding company — it becomes a taxable person in connection with those economic transactions, because such activities are, in contrast to the mere acquisition and ownership of shares, [10] to be regarded as economic activities within the meaning of the Sixth Directive.

17. Finally, it is to be noted that it cannot be for the Court to provide an exhaustive list of all conceivable (economic) activities that may in principle fall within Article 2 or 4(2) of the Sixth Directive. Rather, it is for the national court to determine whether the criteria provided by the Court are applicable to the actual facts of the case before it.

10 — *Polysar*, cited in footnote 3, paragraph 13.

18. Thus, the answer to the first question referred by the national court should, in my view, be that there is 'involvement' of a holding company in its subsidiary where, in addition to exercising its shareholder rights, the holding company also carries out for its subsidiary economic activities within the meaning of Article 4(2) of the Sixth Directive, entailing the carrying out of activities which are subject to value added tax under Article 2 of the Sixth Directive.

V — The second question

19. By its second question, the national court asks whether the receipt of dividends falls within the scope of VAT and whether in that case such receipts are exempt from tax by virtue of Article 13B(d)(5) of the Sixth Directive.

Arguments of the parties

20. Cibo argues that the receipt of dividends can never fall within the scope of the Sixth Directive because, irrespective of any 'involvement', they are to be regarded not as consideration for an economic activity

but simply as the consequence of the mere ownership of shares.

21. On the other hand, the French Government argues in substance that dividends fall within the scope of VAT where there is 'involvement', because they represent the result of the economic activity of acquiring and holding shares. However, while dividends are in principle subject to VAT, they are exempt under Article 13B(d)(5) of the Sixth Directive.

22. The Commission essentially argues that, in the absence of a sufficient direct link between the activities of the holding company and the receipt of dividends, it is not possible to regard dividends as the consideration for economic activities. They are accordingly not payment for services which the holding company provides to its subsidiaries and which are subject to tax under Article 2 of the Sixth Directive.

Assessment

23. As Cibo and the Commission rightly state, according to the case-law of the Court the receipt of dividends by a holding company that 'involves' itself in the management of its subsidiaries can fall within the scope of the Sixth Directive only if the dividends may be regarded as consideration for economic activities, which presupposes a direct link between the activity carried out and the consideration received. [11]

24. The Court has already held in *Sofitam* [12] that dividends are not consideration for an economic activity, that they therefore do not fall within the scope of the Sixth Directive and that dividends resulting from shareholdings consequently fall outside the deduction entitlement.

25. As regards the submission of the French Government, according to which, if the acquisition of shares were an economic activity within the meaning of Article 4(2) of the Sixth Directive, it would be necessary to establish whether there was a direct link between that activity and the receipt of dividends, it is sufficient to refer to the judgment in *Floridienne*.

26. The Court held in *Floridienne* [13] that, in view of the fact that, because of certain features, the amount of dividends depends partly on unknown factors and entitlement

11 — See *Floridienne*, cited in footnote 5, paragraph 20 et seq.

12 — Cited in footnote 3, paragraph 13.

13 — The Court lists various features of dividends in paragraph 22 of this judgment (cited in footnote 5). For example, the existence of distributable profits is generally a prerequisite of paying a dividend and payment is thus dependent on the company's year-end results. Furthermore, the proportions in which the dividend is distributed are determined by reference to the type of shares held.

to dividends is merely a function of shareholding, 'the direct link between the dividend and a supply of services (even where the services are supplied by a shareholder who is paid dividends), which is necessary if the dividends are to constitute consideration for the services, does not exist'. [14]

27. The answer to be given to the second question is accordingly, in my view, that the receipt of dividends distributed by a subsidiary to a holding company falls outside the scope of the Sixth Directive, because the dividends do not amount to consideration for transactions involving the supply of goods or services. Nor, therefore, can they be exempt from tax by virtue of Article 13B(d)(5) of the Sixth Directive.

VI — The third question

28. The third question referred by the national court concerns the consequences for deduction of input tax if the receipt of dividends falls outside the scope of the Sixth Directive. The national court suggests two possibilities: first, deduction of the tax on the costs of acquiring the shares is prohibited; and second, deduction is allowed under the heading of 'general costs'.

Arguments of the parties

29. Cibo refers first to the case-law of the Court which indicates that the receipt of dividends neither gives rise to a right to deduct input tax nor leads to the loss of one. A holding company that 'involves' itself in the management or running of its subsidiaries carries out an economic activity and therefore has the right to deduct tax, in proportion to its taxable and non-taxable activities. Referring to the judgment in *BLP Group*, [15] Cibo argues that deduction is possible except in the case of exempt transactions and that, where goods are acquired in the course of economic activities, the costs of acquisition fall into the category of 'general costs'. These are passed on in the sale price. For undertakings that 'involve' themselves in the management or running of their subsidiaries, the acquisition of the subsidiaries represents the first stage of a possible merger of the undertakings in the group in the future and is thus an economic activity. Tax on these costs of acquisition is therefore deductible.

30. According to the French Government, the third question need not be answered, given the answer which in its view must be given to the second question. The costs

14 — *Floridienne*, paragraph 23.

15 — Case C-4/94 *BLP Group* [1995] ECR I-983.

arising for an undertaking which 'involves' itself in the management or running of a subsidiary when it acquires shares in that subsidiary relate to the general activity of the undertaking. It follows from Article 17(5) and Article 19(1) of the Sixth Directive that dividends in respect of which VAT is not deductible may appear only in the denominator of the fraction. As the dividends are directly, permanently and necessarily connected to the economic activity of the undertaking, there is moreover no question of incidental transactions within the meaning of Article 19(2) of the Sixth Directive, which could be left out of the calculation. [16]

31. The Commission, on the other hand, proceeds on the basis that no deduction is possible in the case of the costs of acquiring shares, that is to say costs that do not relate to a taxable transaction. Since Article 17 of the Sixth Directive makes no provision in respect of transactions arising from an economic activity outside the scope of the Directive, it is for the Member States to determine the method by which the deduction is prohibited. Finally, the Commission considers that the concept of 'general costs' is alien to the Sixth Directive. What is instead decisive is whether the costs relate to taxable, exempt or non-taxable activities of the undertaking. However in the case of Cibo, it is not apparent that the costs of acquiring the stakes in its subsidiaries reappear in the services that it provides to its subsidiaries.

Assessment

32. As regards the deduction of input tax in respect of costs that arise on acquiring shares, it must first be noted that the question referred by the national court only relates to the case where receipts of dividends fall outside the scope of the Sixth Directive. Non-taxable transactions within the meaning of the Sixth Directive are thus at issue.

33. According to Article 17(2) of the Sixth Directive, a taxable person is entitled to deduct input tax in so far as 'the goods and services are used for the purposes of his taxable transactions'. [17] Article 17(2) thus sets out the conditions under which input tax may be deducted. The prohibition against deduction is derived from an *a contrario* interpretation. From Article 17(2) it follows *a contrario* that for transactions other than those specified in the provision (that is to say for exempt and non-taxable transactions), there is no right to deduct.

34. This also gives expression to the intention of the Community legislature to retain in the Sixth Directive the exclusion, provided for in Article 11(2) of the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax, [18] under which deduction is

16 — In this connection, the French Government refers to the judgment in Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 22.

17 — See also, to this effect, Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 27 et seq.

18 — OJ, English Special Edition 1967, p. 16.

precluded in the case of non-taxable transactions. [19]

35. Finally, the exclusion of non-taxable transactions from the right to deduct is consistent with the principles of the value added tax system in Community law. In accordance therewith, the scope of the right to deduct should correspond as far as possible to the sphere of the undertaking's business activity. [20] Thus, the exclusion of the right to deduct for non-taxable transactions appears to be consistent with the system of tax.

36. As the Court has consistently held, the right to deduct arises only when there is a direct and immediate link with taxable transactions. [21]

In the case of *Midland Bank*, which likewise concerned expenditure on services in connection with the acquisition of shares, the Court held that the right to deduct input tax presupposed that, 'the expenditure incurred in obtaining [the goods or services] was part of the cost components of the taxable transactions'. [22]

37. However, the costs that Cibo incurred in acquiring the shares are, in the absence of a direct and immediate link with taxable transactions, rather 'part of the taxable person's general costs' and 'are, as such, components of the price of an undertaking's products'. [23]

38. The legal position is nevertheless different if Cibo can prove, by means of objective evidence, that its costs are part of the cost components of a transaction giving rise to a right to a deduction. [24]

39. Thus, the answer to the third question referred by the national court should, in my view, be that the receipt of dividends falls outside the scope of the Sixth Directive and that the deduction of input tax in respect of costs for the acquisition of shares is excluded in the absence of a direct and immediate link with taxable transactions, unless the taxable person proves by means of objective evidence that that expenditure forms part of the cost components of a transaction giving rise to a right to deduct.

19 — Bulletin of the European Communities, supplement 11/73, p. 18.

20 — Case 165/86 *Intiem* [1988] ECR 1471, paragraph 14.

21 — Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 20, and *BLP Group* cited in footnote 15, paragraph 18 et seq.

22 — *Midland Bank* cited in footnote 21, paragraph 30.

23 — Ibid., paragraph 31.

24 — Ibid., paragraph 32.

VII — Conclusion

40. On the basis of these considerations, I propose to the Court that the questions referred by the national court should be answered as follows:

(1) There is 'involvement' of a holding company in its subsidiary where, in addition to exercising its shareholder rights, the holding company also carries out for its subsidiary economic activities within the meaning of Article 4(2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, entailing the carrying out of activities which are subject to value added tax under Article 2 of the Sixth Directive.

(2) The receipt of dividends distributed by a subsidiary to a holding company falls outside the scope of the Sixth Directive, because the dividends do not amount to consideration for transactions involving the supply of goods or services. Nor, therefore, can they be exempt from tax by virtue of Article 13B(d)(5) of the Sixth Directive.

(3) If the receipt of dividends falls outside the scope of the Sixth Directive, the deduction of input tax in respect of costs for the acquisition of shares is excluded in the absence of a direct and immediate link with taxable transactions, unless the taxable person proves by means of objective evidence that that expenditure forms part of the cost components of a transaction giving rise to a right to deduct.