JUDGMENT OF THE COURT (First Chamber)
14 November 2000 *

In Case C-142/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal de Première Instance de Tournai, Belgium, for a preliminary ruling in the proceedings pending before that court between

Floridienne SA

Berginvest SA

and

Belgian State,

on the interpretation of Article 19 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 (OJ 1977 L 145, p. 1),

* Language of the case: French.

THE COURT (First Chamber),

composed of: M. Wathelet, President of the Chamber, P. Jann and L. Sevón (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Floridienne SA and Berginvest SA, by P. Malherbe, D. Waelbroeck and P.-P. Hendrickx, avocats of the Brussels Bar,

— the Belgian State, by A. Snoecx, Adviser in the Directorate-General for Legal Affairs of the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent, assisted by B. van de Walle de Ghelcke, of the Brussels Bar,

— the Commission of the European Communities, by E. Traversa, Legal Adviser, and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Floridienne SA and Berginvest SA, the Belgian Government and the Commission at the hearing on 17 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 4 April 2000,

gives the following

Judgment

1 By judgment of 31 March 1999, received at the Court on 21 April 1999, the Tribunal de Première Instance (Court of First Instance), Tournai, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 19 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 (OJ 1977 L 145, p. 1, 'the Sixth Directive').

2 That question was raised in proceedings between (i) Floridienne SA ('Floridienne') and Berginvest SA ('Berginvest') and (ii) the Belgian State regarding the treatment, for the purposes of value added tax ('VAT'), of dividends and interest on loans received by those companies in their capacity as holding companies from subsidiaries within the group.

The Community legislation

3 Article 2(1) of the Sixth Directive provides that 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 and, consequently, activities which are not

economic activities fall outside the scope of the tax. Under Article 4(1) of the directive any person who independently carries out in any place any economic activity specified in paragraph 2 is a taxable person. 'Economic activities' is defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services and, *inter alia*, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

4 Article 17 of the Sixth Directive headed 'Origin and scope of the right to deduct' provides, in paragraph 2, that the taxable person has a right to deduct only 'in so far as the goods and services are used for the purposes of his taxable transactions...'. As regards goods and services used by a taxable person both for transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible, under paragraph 5, only such proportion of the VAT is deductible as is attributable to taxable transactions.

5 That proportion is calculated, for the entirety of the transactions carried out by the taxable person, in accordance with Article 19 of the Sixth Directive, paragraphs 1 and 2 of which provide:

'1. The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

— as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),

— as denominator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which value added tax is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A(1)(a).

The proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.

2. By way of derogation from the provisions of paragraph 1, there shall be excluded from the calculation of the deductible proportion, amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business. Amounts of turnover attributable to transactions specified in Article 13B(d), in so far as these are incidental transactions, and to incidental real estate and financial transactions shall also be excluded. Where Member States exercise the option provided under Article 20(5) not to require adjustment in respect of capital goods, they may include disposals of capital goods in the calculation of the deductible proportion.'

The facts in the main proceedings and the question referred for a preliminary ruling

6 The judgment making the reference explains that Floridienne, a holding company at the head of a group of companies operating in the chemicals, plastics and agri-foodstuffs sectors, and Berginvest, an intermediary holding company at the head of the plastics division, claim that they are directly or indirectly involved in the management of their subsidiaries, in particular by supplying them with

administrative, accounting and information technology services and with loan finance. Furthermore, Floridienne and Berginvest receive dividends from their subsidiaries on their shares and interest on the loans.

7 When they provide services to their subsidiaries, Floridienne and Berginvest carry out taxable transactions, in respect of which tax which has been imposed on goods and services supplied to them is deductible. Their practice of deducting the entirety of their input tax has been called into question by the Belgian tax authorities, in particular on the ground that some of the goods and services received are used in the collection of dividends and interest, an activity which the authorities consider to be exempt from VAT. Taking the view that the interest on the loans made by Floridienne and Berginvest to their subsidiaries relates nevertheless to a specific professional activity of a financial nature, the authorities reinstated it in the denominator of the fraction used to calculate the general deductible proportion. By contrast, as regards the dividends, only those paid by the subsidiaries which had actually received management assistance were included in the income reinstated in the denominator of that fraction.

8 In those circumstances, the authorities issued payment orders with a view to recovering the VAT that they alleged was owed by the two companies in respect of transactions carried out between 1990 and 1994. Those orders were for a principal sum of BEF 13 812 839 in the case of Floridienne and BEF 17 598 876 in the case of Berginvest. Those companies brought proceedings to have the payment orders set aside, applying for their annulment and for damages for loss caused to them by the Belgian State.

9 In the national court, Floridienne and Berginvest claimed, *inter alia*, that the system of deductions must be applicable only to transactions covered by the economic activity of the taxable person and that merely holding shares does not

constitute a taxable activity. Moreover, no substantial resources were allocated by the companies to the collection of dividend income or interest from their subsidiaries. Collecting the dividend income produced by those shares does not therefore fall within the scope of VAT.

10 Holding that those two companies were only partially liable to tax, since they carried out both transactions in respect of which VAT could be deducted and transactions outside the scope of VAT, the Tribunal de Première Instance, Tournai, decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Must share dividends and interest on loans always be excluded from the denominator of the fraction used to calculate the deductible proportion, even where the company receiving such dividends and interest has involved itself in the management of the undertakings paying them, save in the exercise of its rights as shareholder?'

The question referred for a preliminary ruling

11 By its question, the national court is asking essentially whether Article 19 of the Sixth Directive must be interpreted as meaning that (i) dividends distributed by its subsidiaries to a holding company, which is subject to VAT in respect of other

activities and which supplies management services to those subsidiaries, and (ii) interest paid by the subsidiaries to the holding company on account of loans it has made to them, must be excluded from the denominator of the fraction used to calculate the deductible proportion.

12 In order to answer that question, it is necessary to consider, in particular, whether the income concerned is outside the scope of VAT since it is not generated by transactions falling within the scope of an economic activity subject to VAT.

13 As regards, first, the dividends, Floridienne and Berginvest submit that they do not constitute consideration for a specific economic activity carried out by the shareholder but merely arise as a result of ownership of the asset and, consequently, do not fall within the scope of VAT and must not be taken into account when calculating the deductible proportion, even if the company which receives the dividends has been involved in the management of its subsidiaries.

14 Although the parent company is subject to VAT in respect of that management activity the dividends are not, however, related to that activity unless they constitute payment for it, which presupposes that there is a direct link with the activity subject to VAT. However, it is hard to believe that such a link exists since dividends are paid as a result of a decision taken unilaterally by the subsidiary and the same dividend is declared in respect of all the shares of a given class, irrespective of whether the shares are owned by the holding company. As to the dispute in the main proceedings, Floridienne and Berginvest point out in that regard that, independently of the dividends allocated to them, they receive specific remuneration for the services they supply to their subsidiaries.

15 The Belgian Government and the Commission submit, by contrast, that the involvement of a parent company in the management of its subsidiaries must be regarded as an economic activity consisting in the exploitation of an asset for the purpose of obtaining income from it in the form of dividends. To that extent, the dividends do actually constitute consideration for that economic activity. Those dividends should therefore be included in the fraction used to calculate the deductible proportion, but solely in the denominator since the activity concerned is not one in respect of which deductions may be made.

16 The Belgian Government adds that interpretation of Article 19 of the Sixth Directive to the contrary would vitiate the principle of the neutrality of VAT by allowing the holding company to deduct all the VAT paid for goods and services used by it, while those goods and services were used for both transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible.

17 In that regard, it should be observed that the Court has consistently held that a holding company whose sole purpose is to acquire holdings in other undertakings, without involving itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not have the status of taxable person and has no right to deduct tax under Article 17 of the Sixth Directive. That conclusion is based, *inter alia*, 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 (see Case C-60/90 *Polysar Investments Netherlands* v *Inspecteur der Invoerrechten* [1991] ECR I-3111, paragraph 17; and Case C-333/91 *Sofitam* [1993] ECR I-3513, paragraph 12).

18 However, the Court has held that 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 (*Polysar*, paragraph 14).

19 It follows that involvement of that kind 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 by Floridienne and Berginvest of administrative, accounting and information technology services to their subsidiaries.

20 Nevertheless, if the receipt of dividends paid by those subsidiaries to the holding company thus involving itself in their management is to fall within the scope of VAT, a further requirement is that the dividends are capable of being regarded as consideration for the economic activity in question, which presupposes that there is a direct link between the activity carried out and the consideration received (see, *inter alia*, Case 154/80 *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12; and Case C-288/94 *Argos Distributors* v *Commissioners of Customs and Excise* [1996] ECR I-5311, paragraph 16).

21 In that regard, the Court has held that, since the receipt of dividends is not the consideration for any economic activity, it does not fall within the scope of VAT. Consequently, dividends resulting from shareholding fall outside the deduction entitlement (*Sofitam*, paragraph 13).

22 Certain features of dividends account, in particular, for their exclusion from VAT. First, it is not in dispute that the existence of distributable profits is generally a prerequisite of paying a dividend and that payment is thus dependent on the company's year-end results. Second, the proportions in which the dividend is distributed are determined by reference to the type of shares held, in particular by reference to classes of shares, and not by reference to the identity of the owner of a particular shareholding. Lastly, dividends represent, by their very nature, the return on investment in a company and are merely the result of ownership of that property (*Polysar*, paragraph 13).

23 In view, specifically, of the fact that the amount of the dividend thus depends partly on unknown factors and that entitlement 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.

24 As regards, secondly, the interest received by a holding company on loans which it has made to its subsidiaries, Floridienne and Berginvest submit that making capital available to a third party constitutes an economic activity consisting in exploiting assets only when it involves more than merely managing an asset and is such that it is linked to another taxable activity of which it is a direct, permanent and necessary extension. That is not the case as regards the transactions giving rise to the dispute in the main proceedings. The two companies have merely reinvested the dividends paid by their subsidiaries in loans to certain of those subsidiaries without there being any link with the management services provided to the subsidiaries. The interest on the loans constitutes, on the contrary, income resulting from ownership of the debts owed by the subsidiaries, or even income from credit transactions incidental to the main activity, namely the holding of shares, which, as such, falls outside the scope of VAT.

25 The Belgian Government and the Commission claim, however, that the income from the loans to the subsidiaries constitutes the direct, permanent and necessary extension of a taxable activity comprising the supply of services, in particular management services, to the subsidiaries and that the income must therefore be included in the denominator of the fraction used to calculate the deductible proportion.

26 In that regard, it must be observed that the Court has held that interest received by a property management company on investments, made for its own account, of sums paid by co-owners or lessees cannot be excluded from the scope of VAT, since the interest does not arise simply from ownership of the asset but is the

consideration for placing capital at the disposition of a third party (Case C-306/94 *Régie Dauphinoise — Cabinet A. Forest* v *Ministre du Budget* [1996] ECR I-3695, paragraph 17).

27 Since Article 2(1) of the Sixth Directive excludes from the scope of VAT transactions in which the taxable person is not acting as such, loan transactions, such as those in point in the main proceedings, are subject to VAT only if they constitute either an economic activity of the operator within the meaning of Article 4(2) of the Sixth Directive or the direct, permanent and necessary extension of a taxable activity, without, however, being incidental to that activity within the meaning of Article 19(2) of the directive (see, to that effect, *Régie Dauphinoise*, paragraph 18).

28 Where a holding company makes capital available to its subsidiaries, that activity may of itself be considered an economic activity, consisting in exploiting that capital with a view to obtaining income by way of interest therefrom on a continuing basis, provided that it is not carried out merely on an occasional basis and is not confined to managing an investment portfolio in the same way as a private investor (see, to that effect, Case C-155/94 *Wellcome Trust* v *Commissioners for Customs and Excise* [1996] ECR I-3013, paragraph 36; and Case C-230/94 *Enkler* v *Finanzamt Homburg* [1996] ECR I-4517, paragraph 20) and provided that it is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment.

29 Moreover, the making by a holding company of loans to subsidiaries to which it supplies administrative, accounting, information technology and general management services cannot be subject to VAT on the ground that it is the direct, permanent and necessary extension of the supply of services within the meaning

of the judgment in *Régie Dauphinoise*. Such loans are neither necessarily nor directly linked to services thus supplied.

30 Furthermore, where a holding company merely reinvests dividends received from its subsidiaries and outside the scope of VAT in loans to those subsidiaries, that in no way constitutes a taxable activity. The interest on such loans must, on the contrary, be considered merely as the result of ownership of the asset and is therefore outside the system of deductions.

31 It falls to the national court to ascertain whether, in the main proceedings, the loan transactions at issue meet, in accordance with the criteria set out in paragraphs 26 to 30 of this judgment, the requirements for subjection to VAT.

32 Therefore, the answer to the question referred to the Court for a preliminary ruling must be that Article 19 of the Sixth Directive is to be interpreted as meaning that the following must be excluded from the denominator of the fraction used to calculate the deductible proportions:

— share dividends paid by its subsidiaries to a holding company which is a taxable person in respect of other activities and which supplies management services to those subsidiaries, and

— interest paid by the subsidiaries to the holding company on loans it has made to them, where the loan transactions do not constitute, for the purposes of Article 4(2) of the Sixth Directive, an economic activity of the holding company.

Costs

33 The costs incurred by the Belgian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Tribunal de Première Instance, Tournai, by judgment of 31 March 1999, hereby rules:

Article 19 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 is to be interpreted as meaning that the following must be excluded from the denominator of the fraction used to calculate the deductible proportions:

— **share dividends paid by its subsidiaries to a holding company which is a taxable person in respect of other activities and which supplies management services to those subsidiaries, and**

— **interest paid by the subsidiaries to the holding company on loans it has made to them, where the loan transactions do not constitute, for the purposes of Article 4(2) of the Sixth Directive, an economic activity of the holding company.**

Wathelet Jann Sevón

Delivered in open court in Luxembourg on 14 November 2000.

R. Grass — Registrar

M. Wathelet — President of the First Chamber