REPORT FOR THE HEARING
in Case C-60/90 *

I — Facts

A — *Legislative background*

1. The scope of the 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 (Official Journal L 145, p. 1, hereinafter 'the Sixth Directive') is defined in Article 2:

'The following shall be subject to value added tax:

(1) the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

(2) the importation of goods.'

2. According to Article 4(1), (2) and (4) of the Sixth Directive:

'(1) "Taxable person" shall mean any person who independently carries out in any place any economic activity 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 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.

(3) ...

(4) The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

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

* Language of the case: Dutch.

another by financial, economic and organizational links.'

3. According to Article 13 of the Sixth Directive, the Member States are to exempt certain activities from value added tax. Thus, more specifically, in accordance with Article 13B(d)(1) and (5), the Member States are to exempt from value added tax:

'(1) the granting and the negotiation of credit and the management of credit by the person granting it;

...

(5) transactions, including negotiation, excluding management and safe-keeping, in shares, interests in companies or associations, debentures and other securities, excluding:

— documents establishing title to goods,

— the rights or securities referred to in Article 5(3)'.

The origin and scope of the right to deduct tax are regulated in Article 17 of the Sixth Directive. According to Article 17(3)(c), Member States are also to grant to every taxable person the right to a deduction or a refund of value added tax in so far as the goods and services are used for the purposes of

'any of the transactions exempted under Article 13B(a) and (d), paragraphs 1 to 5, when the customer is established outside the Community or when these transactions are directly linked with goods intended to be exported to a country outside the Community'.

B — *Facts of the case*

4. The plaintiff in the main proceedings, Polysar Investments Netherlands BV (hereinafter 'Polysar BV'), a company incorporated under Netherlands law and established in Arnhem, holds shares in foreign companies which are engaged in the production and sale of synthetic rubber and similar products. Every year Polysar BV receives substantial amounts in dividends and regularly pays out dividends to the parent company. Polysar BV is not itself engaged in any trading activities. It is a wholly owned subsidiary of Polysar Holding Ltd, a company incorporated in Canada, which is itself a wholly owned subsidiary of Polysar Ltd, which is also incorporated in Canada. Polysar Ltd owns all the shares in Polysar Nederland BV and 97% of the shares in Polysar Handelsmaatschappij BV.

5. Polysar BV received from the Netherlands authorities an assessment to turnover tax in respect of the period from 1 January 1981 to 31 December 1985 inclusive. Following Polysar BV's objection to that notice of assessment, the Inspector of Customs and Excise, Arnhem, confirmed the assessment at issue. The dispute between the parties concerns the question whether Polysar BV is entitled to a refund of the value added tax which it was charged.

6. Polysar BV subsequently challenged that assessment before the Gerechtshof (Regional Court of Appeal), Arnhem, on the ground that it was entitled to a refund of the value added tax which it was charged by third parties.

7. Taking the view that the dispute raised a number of questions concerning the interpretation of Community law, the Gerechtshof resolved, by decision of 30 January 1990, to stay the proceedings and to seek from the Court of Justice, pursuant to Article 177 of the EEC Treaty, a preliminary ruling on the following questions:

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

II — Procedure

8. The order for reference from the Gerechtshof Arnhem was received at the Court Registry on 12 March 1990.

9. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted:

— on behalf of Polysar BV, by N. R. Jansen, tax adviser,

— on behalf of the Netherlands Government, by B. R. Bot, Secretary General at the Ministry of Foreign Affairs,

— on behalf of the French Government, by Philippe Pouzoulet, acting as Agent, assisted by Géraud de Bergues, acting as Deputy Agent,

— on behalf of the Commission of the European Communities, by Johannes Føns Buhl, Legal Adviser to the Commission, and Berend Jan Drijber, a member of the Commission's Legal Department, acting as Agents.

10. On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

11. By decision of 16 January 1991, the Court decided pursuant to Article 95(1) and (2) of the Rules of Procedure to assign the case to the Sixth Chamber.

III — Summary of written observations submitted to the Court

A — *Question 1(a)*

12. *Polysar BV* considers that this question should be answered in the affirmative.

Polysar BV submits, on the basis of the second sentence of Article 4(2) of the Sixth Directive, that where a holding company holds shares in subsidiary companies for the purpose of obtaining income therefrom on a continuing basis it is a taxable person within the meaning of Article 4(1) of that directive. Shares constitute intangible property capable of exploitation. Exploitation is on a continuing basis where annual dividends are paid in several consecutive years. If a person carrying on such an activity were not considered a taxable person, it would mean that investment and management activities are accorded different treatment, according to whether they are carried on in connection with tangible property or in connection with other property, for instance of an intangible kind. There would also be a difference of treatment as between legal persons who finance subsidiaries with their own capital (by acquiring a shareholding) and those who do so with outside capital (that is to say by contracting loans).

13. According to the Netherlands Government, a 'pure' holding company engaged exclusively in shareholding and in carrying on activities as a shareholder, such as the receipt and transfer of dividends in connection with those activities, is neither a trader nor a taxable person, whether as an independent entity or as part of a fiscal unit. A holding company cannot claim the right to deduct tax referred to in Article 17 of the Sixth Directive.

It is apparent from the Court's case-law (and in particular from the judgment in Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471) that the Sixth Directive confers a very wide scope on value added tax. However, even if the concept of 'economic activities' within the meaning of Article 4 of the Sixth Directive is broad in scope, it does not cover acts accomplished exclusively on its own behalf. Only activities carried out on behalf of third parties, or activities closely connected therewith, are to be regarded as 'economic activities' within the meaning of that article. Article 2(1) of the Sixth Directive is based on that notion since the expression 'supply of goods or services' means that only economic activities

carried out on behalf of a third party are covered by the directive. A 'pure' holding company, like an individual shareholder, deals exclusively with the management of assets and, in that capacity, it does not carry on any activities in relation to the company whose shares it holds. Such activities do not constitute economic services. It follows that the dividends received by such companies are not to be regarded as income which is subject to turnover tax.

Nor can a 'pure' holding company form part of a fiscal unit known as 'a single taxable person' within the meaning of the second paragraph of Article 4(4) of the Sixth Directive. According to the Netherlands Government, legal persons who do not themselves carry on business are never so closely bound to other persons by economic links as to form a unit with them. That view is supported by the Netherlands case-law on the concept of fiscal unit (Hoge Raad, 1 April 1987, No 23644, BNB 1987/203).

14. According to the *French Government*, Question 1(a) amounts to asking whether a holding company whose activities are concerned solely with the holding of shares in subsidiary companies must be regarded as a taxable person, within the meaning of Articles 7 and 17 of the Sixth Directive, where its activities consist in the receipt:

— either of dividends, interest and management fees;

— or dividends and interest;

— or only dividends.

The French Government considers the position of a holding company in each of those three possible situations in turn in the light of the Sixth Directive.

In the first situation, it follows from Article 2 in conjunction with Article 4(1) and (4) of the Sixth Directive that a holding company which supplies services to its subsidiaries in its capacity as administrative headquarters, in return for the payment of management fees, falls within the scope of the rules on value added tax and is to be treated as a taxable person. That view is supported by the third indent of Article 9(2)(e) of the Sixth Directive.

As for the second situation, the French Government considers that a holding company which receives interest on loans is subject to value added tax pursuant to Article 13B(d)(1) of the Sixth Directive, which provides that the Member States are to exempt the granting and negotiation of credit and the management of credit by the person granting it. That exemption is necessary only because those transactions are deemed to fall within the scope of the rules on value added tax. The granting of credit involves making funds available subject to a return in the form of interest. It therefore constitutes an exempted provision of services for consideration which falls within the scope of the rules on value added tax when it is effected on a regular basis. Under those circumstances the holding company has no right to deduct tax.

As for the third situation, the French Government considers that, in economic terms, the holding company should not be

regarded as taking an active part in the administration of subsidiaries. It is necessary, however, to determine the nature of the dividends. In support of the view that they constitute a return on payment for a service involving the making available of capital, it should be stated, first of all, that shares held in subsidiaries constitute intangible property which is intended to yield income on a continuing basis, within the meaning of Article 4(2) of the Sixth Directive, and secondly that the receipt of dividends is connected with a transaction in shares within the meaning of Article 13B(d)(5) of the Sixth Directive. However, that view is gainsaid by the spirit and purpose of the common system of value added tax, as set out in the second and eighth recitals in the preamble to the First Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (Official Journal, English Special Edition 1967, p. 14), according to which the need to harmonize legislation on turnover taxes is intended to eliminate any factors likely to distort conditions of competition and thus to result in neutrality in competition, in that within each country similar goods bear the same tax burden, whatever the length of the production and distribution chain. In order to achieve that aim, value added tax, calculated on the price of the goods or services, is chargeable after deduction of the amount of value added tax borne directly by the various cost components. Dividends are never reflected in the cost components, in contrast to the interest or management fees referred to earlier. A dividend does not constitute the consideration for a provision of services within the meaning of the Sixth Directive, since it amounts to a share of the profit and, accordingly, does not fall within the scope of the rules on value added tax. A holding company is not therefore a taxable person in the third situation.

15. According to the French Government, the scope of the right to deduct tax is determined by Articles 17 to 20 of the Sixth Directive.

Thus, in the third situation, a holding company has no right to deduct tax because it carries out only transactions which fall outside the scope of the rules on value added tax and is not therefore a taxable person.

In the second situation, a holding company has no right to deduct tax either, without prejudice to Article 17(3)(c) of the Sixth Directive. Furthermore, if dividends were regarded as a return on a provision of services exempted pursuant to Article 13B(d)(5), the dividends received by undertakings established in non-member countries would confer on the holding company a right to deduct tax pursuant to Article 17, which would be inconsistent with the aim of the Sixth Directive.

Finally, in the first situation, a holding company has a right to deduct, in accordance with Articles 17(5) and 19 of the Sixth Directive, such proportion of the value added tax as is attributable to taxable transactions. That right to deduct tax applies to the holding company in the same manner where the Member State in which the company is established has availed itself of the possibility provided for in the second subparagraph of Article 4(4) of the Sixth Directive.

16. The French Government proposes that the Court should answer the first question submitted for a ruling as follows:

'A holding company whose activities are concerned solely with the holding of shares in subsidiary companies:

— is not a taxable person within the meaning of Articles 4 and 17 of the Sixth Directive if it only receives dividends from its subsidiaries;

— is a taxable person exempt from tax if, apart from the receipt of dividends, it provides the financial services referred to in Article 13B(d) of the Sixth Directive;

— is a taxable person partially liable to value added tax if, apart from the receipt of dividends and the provision of financial services, it provides taxable services, pursuant to Articles 4 and 6 of the Sixth Directive, which do not qualify for any exemption. In those circumstances, only the value added tax on the goods and services used for the purposes of the transactions conferring a right to deduct tax, within the meaning of Article 17(2) of that directive, is deductible.'

17. As a preliminary remark, the *Commission* points out that a distinction must be drawn between three types of holding companies:

— type 1: a holding company whose sole task is to receive dividends from its subsidiaries and pay them out to its own shareholders;

— type 2: a holding company which also carries on investment activities connected with the holding of shares in other companies;

— type 3: a holding company which, apart from financial activities, supplies other services to its subsidiaries in return for charging the costs to them.

In the Commission's view, in the first situation, the company is not a taxable person within the meaning of Article 4 of the Sixth Directive. In the second case, it is a taxable person, but exclusively in respect of the services exempted under Article 13B(d)(5) of the Sixth Directive. In the third case, the holding company is a taxable person providing services which may or may not be exempt. The result is that, in the first and second situations, the value added tax paid by the holding company to third parties is not deductible; in the third situation, it is partially deductible, provided it concerns non-financial services, in accordance with the apportionment rule laid down in Article 17(5) and supplemented by Article 19 of the Sixth Directive.

18. According to the Commission, Polysar BV is a holding company of the first type and is not therefore a taxable person. The possibility cannot be ruled out, however, that Polysar BV is a holding company of the second type, in view of the fact that it is an investment company whose activities are concerned solely with the holding of shares.

19. The Commission suggests that Question 1 should be answered in the negative, unless the national court finds that Polysar BV provides financial services which go beyond activities concerned merely with the holding of shares. The Commission therefore suggests that the Court should answer the question as follows:

'A holding company whose activities are concerned solely with the holding and management of shares in subsidiary companies is not to be regarded as a taxable person within the meaning of Article 4 of the Sixth Directive.'

B — *Question 1(b)*

20. According to *Polysar BV*, in the event of a negative answer to Question 1(a), the holding company is 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, namely the group name. As a world-wide undertaking, the group is a taxable person and all the components of the group are then part of that taxable person. The various parts must then be regarded as taxable persons for the purposes of the application of Article 17 of the Sixth Directive and can deduct value added tax when the group as such provides taxable services under the Community rules.

The distribution of the various components of the group in different countries does not run counter to that argument because the expression '... in any place ...' in Article 4(1) of the Sixth Directive means that a taxable person with subsidiaries in several countries may be regarded as a taxable person in its entirety.

Furthermore, the principle of fiscal neutrality would be contravened if a group composed of several legal persons could be regarded as a taxable person in relation to several of its parts, thereby leading to the possibility of cumulative taxation.

21. The *Netherlands Government* considers that a holding company may, on account of its conduct towards subsidiary companies, be distinguishable from an individual shareholder to such an extent that it would be contrary to the aim and purpose of the system of value added tax not to regard it as a taxable person. Accordingly, it should not be denied the right to deduct tax, provided it is a holding company which carries out within the group an essential economic function for the benefit of all the companies linked to it. That could be so in the case of a holding company forming part of a world-wide or regional group and performing inside the group a decision-making and administrative role for the benefit of the operating companies within that group. An additional factor could be that senior group executives sit on the board of that holding company and/or that, in addition to holding shares, the holding company also carries on other activities on behalf of the group, such as management, financing and advisory activities. A holding company of that kind thus performs, as a decision-making and administrative body, an essential economic function within the group and forms part, as it were, of each of the operating companies to which it may be assimilated.

The Netherlands Government considers that a holding company which takes on such a role within a group forms part of a fiscal unit for the purposes of the second subparagraph of Article 4(4) of the Sixth

Directive. The close connection between the activities of that holding company and the business activities of operating companies supports the conclusion that the holding company and its subsidiaries are bound to one another by close economic links. In view of the group relationship, they are also closely bound to one another by financial and organizational links. So far as the right to deduct tax under Article 17 of the Sixth Directive is concerned, a fiscal unit has the status of a taxable person and it may therefore deduct tax in so far as it provides taxable services.

The fact that a holding company — a decision-making and administrative body — may be assimilated to each of the operating companies is borne out by the fact that its expenses are in general passed on to those companies. In those circumstances, the Netherlands Government considers that, if no fiscal unit exists, it is necessary to confer a right to deduct tax on the holding company, the decision-making and administrative body. Having regard to the holding company's position in relation to the operating companies, it makes sense to fix the rate of deduction on the basis of that to which operating companies are entitled. The Netherlands Government relies, in support of that argument concerning the right to deduct tax, on the judgment in Case 165/86 *Intiem* v *Staatssecretaris von Financien* [1988] ECR 1471, from which it follows that the right is broader in scope than is suggested by the wording of the provisions of the Sixth Directive. The deduction mechanism should be applied in such a way as to correspond in scope to the sphere of the taxable person's professional or trade activities. By analogy, the right to deduct tax should not be ruled out where a holding company — the decision-making and administrative body — is assimilated to the operating companies.

In conclusion, the Netherlands Government suggests that Question 1(b) should be answered in the affirmative. In a situation of the kind at issue in the dispute in the main proceedings, there is neither a fiscal obligation nor a right to deduct tax since it would seem that Polysar BV is not a holding company — a decision-making and administrative body — having regard to its position within the group.

22. In the opinion of the *French Government*, its analysis in connection with the proposed answer to Question 1(a) is independent of the question whether the holding company forms part of a world-wide group of undertakings. The second subparagraph of Article 4(4) of the Sixth Directive cannot be interpreted as authorizing the Member States to treat as a single taxable person persons established in different States, whether they are Member States or non-member countries. The status of taxable person must be assessed within the territory of the country. The French Government suggests, therefore, that the answer to Question 1(b) should be that, pursuant to Articles 2 to 4 of the Sixth Directive, the status of taxable person is to be assessed within the territory of the country, within the meaning of Article 3 of that directive.

23. According to the *Commission*, the question whether or not the holding company in question forms a link in a world-wide group is immaterial. To qualify as a taxable person under Article 4(1) of the Sixth Directive, a company must carry on the economic activities referred to in Article 4(2). If it does not, then the fact of belonging to an international group in no way alters its status as a non-taxable person. The Commission suggests that the Court's answer should be that the fact that the holding company forms an integral part of

an international group in which other companies provide taxable services is immaterial.

C — *Questions 2(a) and (b)*

24. *Polysar BV* claims in the first place that, on the assumption that a holding company is to be considered a taxable person, the activities which it carries on constitute transactions within the meaning of Article 13B(d)(5) of the Sixth Directive. These are transactions in shares in companies within the meaning of that provision. Accordingly, there is no right to deduct tax, without prejudice to the application of Article 17(3)(c) of the Sixth Directive.

Secondly, Polysar BV adds that, if the answer to Question 1(b) is that a holding company is a taxable person, that taxable person forms part of a world-wide group. As such, it has a right to deduct tax if the group provides taxable services under Community law.

25. With regard to Question 2(b), Polysar BV considers that the answer has to be different if the holding company must, as part of the world-wide group, be regarded as a taxable person for the purposes of the application of Article 17 of the Sixth Directive. In a situation of that kind, there is a right to deduct turnover tax where the group as such provides taxable services under Community law.

26. The *Netherlands Government* considers that if a holding company which is concerned solely with the holding of shares and which engages in activities closely connected therewith is to be considered a taxable person, the holding of those shares and those activities constitute transactions within the meaning of Article 13B(d)(5) of the Sixth Directive. Accordingly, there is no reason to view such activities in fiscal terms. The right to a deduction would then arise only under Article 17(3)(d) of the Sixth Directive. It is only in the case of a holding company which is a decision-making and administrative body that the right to deduct tax should not be excluded if, and in so far as, the operating companies linked to it have that right.

27. The *French Government* considers that, in the light of its proposed answers to the first two questions, it is unnecessary to answer Questions 2(a) and (b) from the national court.

28. According to the *Commission*, a holding company which, on the one hand, collects dividends from its subsidiaries and pays them out to its own shareholders and, on the other, carries on financial activities, is not liable to tax in respect of the activities connected with the dividend and is an exempted taxable person in respect of the financial activities. It would be otherwise only if the value added tax paid related to activities other than those exempted.

29. With regard to Question 2(b), the Commission states that the national court is asking whether Polysar BV forms, together with other Polysar companies whose activities are not exempt, a fiscal unit for the purposes of Article 4(4) of the Sixth

Directive. It is for the national court to determine whether the factual conditions laid down by that provision were fulfilled in this case. In the Commission's view, Polysar BV does not form part of a fiscal unit. Only natural or legal persons established within the territory of a single Member State are capable of constituting a fiscal unit. According to the organization chart of the Polysar group, the Netherlands companies Polysar Nederland BV and Polysar Handelsmaatschappij BV are respectively wholly-owned and 97%-owned subsidiaries not of Polysar BV but of the parent company Polysar Ltd. One is a manufacturing company, and the other is a sales company. In those circumstances, Polysar BV cannot be regarded as being closely bound to those companies by financial, economic and organizational links.

30. In conclusion, the Commission proposes that the Court should answer Questions 2(a) and (b) as follows:

'The financial services provided by a holding company, which are additional to its activities concerned with the holding and management of shares in subsidiary companies but are connected therewith, are exempt from value added tax pursuant to Article 13B(d)(5) of the Sixth Directive.

So far as concerns the answer to the first and second questions, the fact that a holding company forms an integral part of an international group, in which other companies provide taxable services, is immaterial.'

G. F. Mancini
Judge-Rapporteur