JUDGMENT OF THE COURT (FIRST CHAMBER)
1 JULY 1982 [1]

B.A.Z. Bausystem AG v Finanzamt München für Körperschaften (reference for a preliminary ruling from the Finanzgericht München)

(Value-added tax — Interest on account of late payment)

Case 222/81

Tax provisions — Harmonization of laws — Turnover taxes — Common system of value-added tax — Provision of services — Basis of assessment — Consideration for the service — Concept — Interest on account of late payment awarded by a judicial decision — Exclusion

(Council Directive No 67/228, Art. 8 (2))

The concept of consideration, which constitutes the basis of assessment for the provision of services as provided for in Article 8 (a) of the Second Directive on the harmonization of legislation of Member States concerning turnover taxes, does not cover interest awarded to an undertaking by a judicial decision where such interest has been awarded to it by reason of the fact that the balance of the consideration for the services provided has not been paid in due time.

In Case 222/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München (Finance Court, Munich) for a preliminary ruling in the action pending before that court between

B.A.Z. BAUSYSTEM AG, Zürich (Switzerland),

and

FINANZAMT MÜNCHEN FÜR KÖRPERSCHAFTEN [Munich Revenue Office for Corporations],

1 — Language of the Case: German.

on the interpretation of the term "consideration" in Article 8 (a) of the Second Council Directive No 67/228/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16),

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The judgment making the reference, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. The rules in question

According to Article 8 (a) of the Second Council Directive, in the case of the supply of goods and the provision of services, the basis of assessment is to be:

"... everything which makes up the consideration for the supply of the goods or the provision of services, including all expenses and taxes except the value-added tax itself."

Paragraph 13 of Annex A to the directive provides that:

"The expression 'consideration' means everything received in return for the supply of goods or the provision of services, including incidental expenses (packing, transport, insurance, etc.), that is to say not only the cash amounts charged, but also, for example, the value

of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received."

Article 11 A (1) (a) of the Sixth Council Directive 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 1977, L 145, p. 1), on the other hand, provides differently that within the territory of the country the taxable amount is to be:

"In respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, 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 for such supplies including subsidies directly linked to the price of such supplies."

The term "consideration" ("Entgelt") is defined in the second sentence of the first paragraph of Article 10 of the German Umsatzsteuergesetz [Law on Turnover Tax] 1967 as follows:

"Consideration means everything which it has been agreed that the recipient of goods or services shall give in return for such goods or services, excluding turnover tax."

According to Articles 352 and 353 of the Handelsgesetzbuch [German Commercial Code], in their commercial dealings traders are entitled to demand interest (interest payable after the due date) from the date on which the debt falls due on debts arising out of transactions entered into between them. The rate of interest is 5 %. If, in addition to the debt's falling due, the conditions concerning late payment laid down in Article 284 of the Bürgerliches Gesetzbuch [German Civil Code] are complied with (demand for payment after the debt falls due or specifying of a due date for payment), a higher rate of interest may be demanded by way of compensation for late payment (Article 288 (2) in conjunction with Article 286 of the Bürgerliches Gesetzbuch).

2. The facts

On 23 June 1971, the Swiss company, B.A.Z. Bausystem AG of Zurich (hereinafter referred to as "Bausystem"), was given a contract by a consortium of four German undertakings (hereinafter referred to as "the consortium") for the construction of the upper levels of a multistorey car park in Berlin. The work was to be finished by 21 April 1973; in the event of any delay, Bausystem was to pay a penalty of DM 2 500 per working day. Part of the work, subcontracted by Bausystem to another undertaking, was carried out unsatisfactorily, and on 2 July 1973 the consortium withdrew the order and terminated the contract.

Bausystem brought an action against the consortium before the Landgericht München [Regional Court, Munich] claiming payment for the work carried out together with interest at 5% from the date when the application was lodged. By a judgment of 24 February 1977, the Landgericht fixed the debt owed to Bausystem at DM 665 586 and held that it was entitled to interest.

On appeal by the consortium, the Oberlandesgericht München [Higher Regional Court, Munich], by a judgment of 24 November 1978, fixed the balance owed to Bausystem at DM 584 249.63 together with interest thereon at 5% from 15 January 1974, the date when the amount of the claim was determined by Bausystem and thus the date due for payment.

After an inspection of the company's records, the Finanzamt München für Körperschaften [Munich Revenue Office for Corporations, hereinafter referred as "the Finanzamt"] assessed the turnover tax payable by Bausystem for 1973 at DM 191 050.85; in doing so it included in the calculation of the turnover attributable to the contract in question an amount of DM 143 628 in respect of the interest paid pursuant to the above-mentioned judgment.

The complaint lodged by Bausystem against the Finanzamt's decision was unsuccessful. It then brought an action before the Finanzgericht München [Finace Court, Munich], challenging the inclusion of the interest in the basis of assessment for turnover tax for 1973.

Before the Finanzgericht, Bausystem claimed that in this case the judgment delivered by the Oberlandesgericht München was to be substituted for the invoice normally issued by the undertaking. That meant that the consortium was entitled to deduct as input tax only the amount which was computed in the judgment as turnover tax and awarded to Bausystem. It was clear from the calculations made by the Oberlandesgericht that the interest was not regarded as consideration subject to turnover tax. The taxation of the interest by the Finanzamt was contrary to the basic principles of the law on value-added tax, because the consortium was unable to claim a corresponding amount as input tax.

Moreover, in the present case the interest did not represent a payment incidental to the main payment, because the court fixed current account interest, which was no longer related to the claim in respect of the work performed. Therefore it could not be regarded as consideration. As long as there had been dealings between Bausystem and the consortium, a current account relationship had existed between them. Since the dealings had extended over a number of years, they constituted continous current account trading.

The Finanzamt, on the other hand, contended that the inclusion of the interest on account of late payment in the basis of assessment to value-added tax was lawful. As interest on account of late payment, such interest constituted an additional payment and was therefore part of the consideration for the work performed by Bausystem. It could not be inferred from Article 352 of the Handelsgesetzbuch, which also applied to interest on account of late payment, that the Oberlandesgericht had fixed current account interest. Furthermore, that court had made no ruling as to the way in which the interest was to be treated for the purpose of turnover tax.

3. The question submitted for a preliminary ruling

Considering that a question concerning the interpretation of a provision of Community law had arisen, the Finanzgericht München decided by order of 30 June 1981 to stay the proceedings and to refer to the Court of Justice for a preliminary ruling under Article 177 of the Treaty the following question:

"How is the expression 'Wert der Gegenleistung' [value of the consideration] [1] in Article 8 of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax [Official Journal, English Special Edition 1967, p. 16] to be interpreted? Does it include payments which the undertaking receives in addition to the agreed price of the goods or service because that sum is not paid in due time, where the additional payment is calculated in the form of interest on the outstanding claim and its purpose is to indemnify the creditor for the damage due to the delay in payment?"

1 — Translator's note: The words actually used in the provision in question are "alles, was den Gegenwert ... bildet" ["everything which makes up the consideration"].

The Finanzgericht states that the older German works on turnover tax law and also the earlier decisions of the Reichsfinanzhof [Finance Court of the Reich] (judgment of 1 February 1929, V A 722/28, Reichssteuerblatt [Tax Gazette of the Reich] 1929, p. 237) considered that in view of its compensatory nature interest on account of late payment was not subject to turnover tax. Now that the Reichsfinanzhof, and following it, the Bundesfinanzhof [Federal Finance Court] have departed from that view, it is only seldom to be found in modern works, and in the Finanzgericht's view there are cogent criticisms to be made of it. Although interest payable from the due date or on account of late payment has a specific legal basis, namely, failure to pay or delay in payment, it is closely linked to the purchase price or the charge for work done or services supplied, which constitutes the true consideration for the supply of goods or provision of services. It is dependent on the actual existence and amount of the supplier's claim for the price or his charges and becomes payable only upon the failure to satisfy that claim in due time. It was later held by the Reichsfinanzhof (judgment of 23. 6. 1939, V 421/37, Reichssteuerblatt 1939, p. 1011) and also by the Bundesfinanzhof in a consistent line of decisions (judgments of 29. 11. 1955, V 79/55 S, Bundessteuerblatt [Federal Tax Gazette] III 1956, p. 53, and of 16. 12. 1971, V R 2/69, Bundessteuerblatt II 1972, p. 508) that the factual and economic circumstances in each of those cases justified the inclusion of the interest on account of late payment in the basis of assessment for turnover tax; academic works have overwhelmingly followed that view.

The Finanzgericht considers that the problem cannot be solved simply by referring to paragraph 13 of Annex A to the Second Directive, which expressly refers to incidental expenses as part of the "consideration". Indeed the following words ("packing, transport, insurance, etc.") show that those incidental expenses in fact refer to any addition to the purchase price which is attributable to the method of delivery and that they represent a reimbursement of costs incurred by the supplier in connection with the delivery of the goods. Therefore the fact that such sums are included in the consideration does not enable any conclusion to be drawn up as to the correct manner of treating sums which are paid out by the recipient of goods or services, in addition to the agreed consideration, by reason of the fact that he failed to pay the consideration on time and is therfore obliged to indemnify the supplier of the goods or services by the payment of interest.

According to the Finanzgericht, for the purpose of determining the basis of assessment, there are two different grounds for referring to Article 8 of the Second Directive, on which the national provision is based, in order to interpret the first paragraph of Article 10 of the Umsatzsteuergesetz. First, it might be supposed that on the introduction of value-added tax the legislature of the Federal Republic of Germany — as is shown by the preparatory documents relating to the law — was aware of the obligations arising under Community law and intended to model the German law on turnover tax on the provisions of the Second Directive. Secondly, the obligations imposed on Member States by the Treaty and by Community legislation are binding not only on their legislatures but also, in the context of their powers under national law, on all those upon whom public authority is conferred. For that reason, by virtue of the duty imposed on the Member States by Article 5 of the EEC Treaty to act in a manner which will further the Community interest, the courts of the Member States are bound, when interpreting and applying national legal

provisions which are based on Community legislation, to take into account the wording, sense and purpose of the Community legislation and thereby to facilitate the achievement of the objectives of the Treaty.

The Finanzgericht takes the view that the definition of the basis of assessment contained in Article 8 (a) of the Second Directive is equivalent in meaning to the definition of the term, "consideration" ("Entgelt") in the German Umsatzsteuergesetz, adopted by that law as the basis of assessment. The question concerning the interpretation of Article 8 (a) of the Second Directive therefore coincides with that relating to the corresponding provision of the German law on turnover tax. It is of particular importance that the basis of assessment for turnover tax should be uniform in a common system of value-added tax within the Community.

4. Written procedure before the Court

The order of the Finanzgericht München was received at the Court Registry on 22 July 1981.

Written observations were submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC by B.A.Z. Bausystem AG, represented by Mr Krupinski of Controll-expert GmbH, Accountants, Munich, by the Finanzamt München für Körperschaften, represented by the Director, Mr Röttges, by the government of the Kingdom of Denmark, represented by Laurids Mikaelsen, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, Erich Zimmermann, acting as Agent.

Upon 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. As no Member State or institution of the Communities had requested that the case be decided in plenary session, it also decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the First Chamber.

II — Written observations submitted to the Court

1. Observations submitted by Bausystem

Consideration is defined in the German Umsatzsteuergesetz as everything which it has been agreed that the recipient of goods or services is to give in return for such goods or services. On the basis of that definition the payment of interest fixed by reason of the late payment of the consideration cannot be regarded as consideration, because such interest is not paid in return for the goods or services (since the recipient of the goods or services has already received them some time before). That interest is in fact paid as compensation for the fact that the consideration was not paid or was paid only after the court's judgment. The payment of interest thus has no connection with the goods or services or the receipt thereof, and the interest constitutes compensation for the delay in payment.

2. Observations submitted by the Finanzamt

According to the well-established case-law of the Bundesfinanzhof, consideration includes, in addition to the actual purchase price, the other amounts which are paid by the recipient of the goods or services and which have an economic nexus with the purchase price. In the judgments cited by the Finanz-

gericht München, the Bundesfinanzhof decided that interest on account of late payment was part of the consideration for the supply of goods or provision of services subject to turnover tax, since it had a direct economic nexus with the goods supplied or services provided. Without the latter, that interest would not be payable. It was therefore not to be considered in isolation but only in the context of its factual and economic nexus with the goods supplied or services provided. For the purchaser of goods who has to pay interest on account of the late payment of the purchase price, the cost of the goods is not the purchase price alone, but the purchase price together with the interest.

The taxation of interest on account of late payment as part of the consideration is also in accordance with the provisions of the Second Council Directive. The "incidental expenses" referred to in paragraph 13 of Annex A are the expenses which are paid by the recipient of goods or services in addition to the consideration *sensu stricto* (purchase price, amount charged for work done or services performed) and which are of secondary importance in relation to that consideration. Those considerations are met in the case of interest due on account of late payment, which constitutes compensation for the cost of the necessary financing of the unpaid price from the creditor's own resources.

The interest of account of late payment which must be paid by the recipient of the services therefore constitutes additional consideration for the service provided by the undertaking and not consideration for a special transaction undertaken independently of that service. It is payable by virtue of the law. In addition to the actual service, the undertaking does not provide a special service (such as credit facilities) for which payment must be made by interest on account of late payment. It follows that the undertaking which provides the services has an unlimited right to make a deduction. Indeed, Article 11 (2) of the Second Directive excludes deduction only in relation to tax on goods and services used in non-taxable or exempt transactions. In this case, Bausystem provided services for another undertaking which had the right to make a deduction. The provisions of the directive concerning the basis of assessment (Article 8 (a)) apply to any supply of goods or provision of services, regardless of whether or not the recipient thereof has the right to make a deduction, and therefore also to supplies at the stage of final consumption. If interest on account of late payment were not included in the basis of assessment, part of the supply — namely, the part paid for by means of interest on account of late payment — would not be subject to value-added tax, because the undertaking, on the one hand, would not have to pay tax on the interest received and, on the other hand, would have an unlimited right to make a deduction. That solution would amount to an exemption from tax with deduction and consequently to a supply wholly free of tax (zero-rated), which would be incompatible with the basic principles of the common system of value-added tax. According to the last indent of Article 17 of the Second Directive, subject to the consultations mentioned in Article 16, such a zero rate for the benefit of the final consumer is permissible as a transitional measure only for clearly defined social reasons and, in addition, only in so far as it was granted prior to the directive's application. Those two conditions are not fulfilled in so far as interest on account of late payment is concerned.

3. *Observations submitted by the Danish Government*

By way of introduction the Danish Government emphasizes that the Second Directive has not been applicable since 1 January 1978, the date of the Sixth

Directive's entry into force. In its view, it cannot be ruled out that the interpretation to be given by the Court in this case to the term "consideration" in the Second Directive may be important for the interpretation of the corresponding term contained in Article 11 of the Sixth Directive. Conversely, the legal ideas underlying the Sixth Directive are not without importance in relation to the interpretation of the Second Directive. The Danish Government further recalls in that regard that the Sixth Directive defines the basis of assessment to be taken into account for the purpose of the calculation of the Community's own resources, in so far as they accrue from value-added tax (cf. Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Community's own resources, Official Journal, English Special Edition 1970 (I), p. 224).

The Court should reply in the negative to the question submitted. Indeed, just as credit interest (and current account interest) is consideration not for the goods supplied or services provided, but for the credit granted, interest on account of late payment is not consideration for the goods supplied or services provided. Whether it is a question of interest on overdue payment (which runs in principle from the due date) or of interest fixed by the court (which runs from the date on which application is made to the Court), interest on account of late payment is not part of the consideration for the goods supplied or services provided, but rather consideration for the failure to satisfy an obligation and for the resulting credit, which, though was not provided for in the contract, is actually supplied. That is the ordinary linguistic interpretation of Article 8 of the Second Directive. The fact that the price and the due date for payment are fixed in the agreement concerning the supply of goods or provision of services is irrelevant.

The linguistic interpretation — which in the view of the Danish Government is conclusive — is corroborated by certain factors relating to the Second Directive. First, the chargeable event is to occur at the moment when delivery is effected or the service is provided (Article 5 (5) and Article 6 (4)). Next, the Second Directive does not specify the chargeable event in relation to interest on account of late payment and it is impossible to apply to such interest the moment (defined in the directive) when the chargeable event of delivery or provision of the service occurs. Such a provision would be necessary. It is decisive not merely with regard to the determination of the taxable person's liability in relation to the Member State, but also, where appropriate, with regard to the applicable rate. Since in this case there was no service subject to value-added tax, it does not seem necessary to determine the moment when the chargeable event occurred. Finally, the grant of credit as such is not subject to value-added tax under the rules laid down in the Second Directive (Article 6 (2)).

The interpretation put forward by the Danish Government is further supported by the legal ideas underlying the adoption of the Sixth Directive. Indeed, interest on account of late payment ought, if it were considered necessary, to have been included in Article 11 A (2) among the expenses to be included in the taxable amount; moreover, credit transactions are exempt from tax (Article 13 B (d) (1)).

4. Observations submitting by the Commission

The reason for the payment of interest after the due date or interest on account

of late payment is not a supply agreed upon by the contracting parties, but the failure to fulfil in due time the obligation to pay provided for in the contract. There would be an agreed supply if the parties had arranged that the consortium should be granted a specified period within which to pay for the work (the due date for the debt would then be postponed until the expiry of the period for payment and the interest after the due date provided for in Article 353 of the Handelsgesetzbuch would not then be payable). There was no such agreement in this case.

In everyday language, a taxable person does not deliver goods or provide a service against payment when the recipient, contrary to the agreement reached, does not furnish the consideration on the due date. The late payment of the consideration takes place against the will of the taxable person. The intention to perform, which is presumed to exist in the case of the supply of goods and provision of services subject to turnover tax, is therefore absent. A typical example of where there is no such intention and consequently no reciprocal performance subject to turnover tax is the payment of damages. Damages are not awarded for goods supplied or services provided but because the person who caused the damage has unlawfully caused injury and is therefore bound to eliminate the injury under legal or contractual provisions. Consequently, payments made by way of compensation are not subject to turnover tax. The situation is no different in the case of payment after the due date of the consideration for goods supplied or services provided, where the recipient of the goods or services fails to meet his obligations by not providing the consideration in due time and is therefore required, under legal or contractual provisions, to compensate for the injury suffered by the other contracting party by the payment of interest.

Article 8 (a) of the Second Directive and Annex A thereto show that an endeavour was made to define the concept of consideration as widely and fully as possible, in order to make subject to tax everything which the taxable person receives as consideration for the goods supplied or services provided. There must, however, always be a supply of goods or provision of services by the taxable person — albeit in the form of incidental services, such as packing, transport, insurance and the like — corresponding to the consideration. That condition is not fulfilled when, without his agreement, the taxable person receives the agreed consideration after the due date and the debtor must pay interest on account of the late payment by way of compensation.

The question of the taxation of interest due on account of late payment was the subject of negotiations and discussions prior to the adoption of the Sixth Council Directive. In the proposal submitted to the Council by the Commission on 29 June 1973 (Bulletin of the European Communities, Supplement 11/73), it was provided in Article 12 A (3) that the taxable amount was not to include "interest to be paid on deferred or delayed payments". The Commission gave the following reasons for its proposal:

"Paragraph 3 provides that certain items are to be excluded in calculating the taxable amount. These include interest due on account of deferred or late payment and the cost of returnable packings.

The exclusion of interest on sales on deferred terms is analagous to the exemption in respect of credit transactions provided for in Article 14 (B) (j).

The exclusion of interest on account of late payment is justified by the fact that such interest, being intended to penalize

the buyer, cannot be said to form part of a normal commercial transaction."

As no agreement was reached by the Council, the exemption for interest due on account of deferred or late payment expressly proposed by the Commission was not included in the final version of the Sixth Directive. The exclusion of the provision proposed by the Commission providing for a formal exemption does not, however, mean that the opposite system, that is to say the taxation of interest on account of deferred or late payment, applies, or that the Member States have been left to choose whether or not to tax interest due on account of deferred or late payment in their internal legislation concerning turnover tax. In reality the question was left open. However, since the objective of the directives on value-added tax is to harmonize national laws concerning turnover taxes and so to ensure equal conditions of competition at national and Community level, Community law demands that a uniform answer should be given to that question in all Member States. A system which was not uniform, but was decided upon by each Member State individually, would be permissible only if the directive contained a reservation to that effect. The Second Directive, as well as the Sixth Directive, contains innumerable reservations permitting special national rules, but the fact that there is express and detailed provision for such reservations in each directive constitutes a ground for concluding that the rules relating to turnover taxes must be laid down in a uniform manner in the Member States.

The grounds on which some Member States oppose the exemption of interest from tax relate only to interest due on account of deferred payment. In the case of interest due on account of deferred payment, in contrast to that of interest payable after the due date and interest on account of late payment, there is voluntary reciprocal performance since the deferred payment or grant of a specified period for payment of the consideration is agreed between the parties in exchange for payment of appropriate interest. In relation to interest payable for failure to pay the consideration by the due date, there are no grounds to fear that tax will be evaded by the declaration of part of the agreed consideration as interest or that there will be inequality of treatment, in particular in relation to leasing transactions. It is on the contrary a case which does not fall within the category of reciprocal performance subject to turnover tax, with the result that there can be no question of collection of turnover tax.

Interest due on account of late payment of the consideration is not subject to turnover tax in any Member State apart from the Federal Republic of Germany. In the Belgian and Italian legislation on value-added tax, it is expressly provided that interest due on account of late payment of the consideration is not to be included in the basis of assessment of value-added tax. In France, whilst interest due on account of deferred payment is subject to turnover tax, interest on account of late payment is not. In the United Kingdom, the law excludes from the taxable amount interest payable in the case of purchases by instalment and other transactions falling within the Hire Purchase Act. According to the information available to the Commission, interest due on account of late payment of the consideration is also excluded from the taxable amount. In Ireland, Luxembourg and the Netherlands, there is no legislation on the question at issue; apparently, however, interest due on account of late payment of the consideration is not subject to turnover tax in any of those three States.

If, contrary to the opinion expressed by the Commission, interest payable after the due date and interest on account of late payment were subject to tax, a difficulty would arise owing to the fact that at the moment when delivery was effected or the service was provided it would not be possible to determine the amount of value-added tax payable. In this case, the amount of interest payable to Bausystem by the consortium could not be determined until after payment of the balance of the debt. Since the consortium was not ordered by the Oberlandesgericht München to pay the balance until 1978, more than four years had elapsed since the date on which the debt fell due. According to the Finanzamt's argument that the interest received was subject to value-added tax in respect of 1973, the definitive amount of tax payable in respect of a liability to tax arising in 1973 could not have been calculated until five years later. That would be contrary to the legal principles concerning value-added tax, whereby the chargeable event is to occur at the moment when delivery is effected or the service is provided (Article 6 (4) of the Second Directive; Article 10 (2) of the Sixth Directive). The derogation contained in the second sentence of Article 6 (4) authorizes the Member States only to bring forward the date on which the liability to tax arises and not to postpone it until after the date when the provision of services is completed.

III — Oral procedure

At the sitting on 4 March 1982 oral argument was presented by H. J. Kleiner, acting as Agent, for the defendant in the main action, and by W. D. Krause-Ablass, Rechtsanwalt, Düsseldorf, for the Commission of the European Communities.

The Advocate General delivered her opinion at the sitting on 6 May 1982.

Decision

1 By an order of 30 June 1981, which was received at the Court on 22 July 1981, the Finanzgericht München [Finance Court, Munich] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of the term "consideration" in Article 8 (a) of the Second Council Directive No 67/228 of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16).

2 The main action concerns the inclusion of interest on account of late payment in the basis for the assessment of the turnover tax claimed from the plaintiff, B.A.Z. Bausystem AG, Zürich (hereinafter referred to as "Bausystem").

3 A consortium of four German undertakings gave the plaintiff a contract to carry out work in a car park in West Berlin. Part of the work was sub-contracted by Bausystem to another undertaking, which failed to carry out the work properly. On 2 July 1973 the consortium therefore terminated its contract with Bausystem. The consortium refused to pay the amount due to Bausystem for the work carried out and Bausystem brought an action before the Landgericht München [Regional Court, Munich]. Upon appeal against that decision by the consortium, the Oberlandesgericht München [Higher Regional Court, Munich] by a judgment of 24 November 1978 fixed the amount due at DM 584 249.63, together with interest thereon at 5% from 15 January 1974, the date when Bausystem quantified the debt.

4 After an inspection of the company's records, the German customs authorities assessed the value-added tax payable by Bausystem for 1973 at DM 191 050.85, including in the taxable amount a sum of DM 143 628 in respect of the interest paid pursuant to the judgment of the Oberlandesgericht.

5 The complaint lodged by Bausystem against the assessment of a sum of DM 14 233.40 in respect of value-added tax on the interest paid by the consortium was unsuccessful. Bausystem then brought an action before the Finanzgericht München, which has referred to the Court for a preliminary ruling the following question:

"How is the expression 'Wert der Gegenleistung' [value of the consideration] [1] in Article 8 (a) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax to be interpreted? Does it include payments which the undertaking receives in addition to the agreed price of the goods or services because that sum is not paid in due time, where the additional payment is calculated in the form of interest on the outstanding claim and its purpose is to indemnify the creditor for the damage due to the delay in payment?"

6 Article 8 (a) of the Second Directive reads as follows:

1 — Translator's note: The words actually used in the provision in question are "alles, was den Gegenwert ... bildet" ["everything which makes up the consideration"].

"The basis of assessment shall be:

(a) in the case of supply of goods and of the provision of services, everything which makes up the consideration for the supply of the goods or the provision of services, including all expenses and taxes except the value-added tax itself."

7 Paragraph 13 of Annex A, which forms an integral part of the directive, provides:

"The expression 'consideration' means everything received in return for the supply of goods or the provision of services, including incidental expenses (packing, transport, insurance, etc), that is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received."

8 Having regard to the above-mentioned provisions, it should be noted that the interest in question in the main action has no connection with the services provided or the receipt of the services and does not constitute the consideration ("Entgelt") relating to a commercial transaction. On the contrary, it represents simply the reimbursement of expenses, that is to say compensation for the delay in payment.

9 The German tax authorities take the view that, as an expense which the recipient of services pays in addition to the actual consideration, such interest is covered by the "incidental expenses" referred to in paragraph 13 of Annex A and should therefore be regarded as additional consideration paid for the service provided by the undertaking. That view cannot be accepted.

10 Indeed, the undertaking was compelled to agree to a delay in payment, not provided for in the contract, on the part of the recipient of its services. The interest which constitutes the consideration for that delay was fixed by a court in application of the provisions of both the Bürgerliches Gesetzbuch [German Civil Code] and the Handelsgesetzbuch [German Commercial Code]. In those circumstances, the grant of credit is only remotely connected to the main services provided. The interest payable in respect of such credit cannot therefore be described as supplementary payment.

11 It follows from those considerations that the answer to the question submitted by the national court should be that the basis of assessment referred to in Article 8 (a) of the Second Council Directive of 11 April 1967

on the harmonization of legislation of Member States concerning turnover taxes does not include interest awarded to an undertaking by a judicial decision where such interest has been awarded to it by reason of the fact that the balance of the consideration for the services provided has not been paid in due time.

Costs

12 The costs incurred by the Danish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action 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 Finanzgericht München by order of 30 June 1981, hereby rules:

The basis of assessment referred to in Article 8 (a) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes does not include interest awarded to an undertaking by a judicial decision where such interest has been awarded to it by reason of the fact that the balance of the consideration for the services provided has not been paid in due time.

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 1 July 1982.

J. A. Pompe
Deputy Registrar

G. Bosco
President of the First Chamber