JUDGMENT OF THE COURT (Fifth Chamber)

20 June 1996 *

In Case C-155/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Value Added Tax Tribunal, London, for a preliminary ruling in the proceedings pending before that tribunal between

Wellcome Trust Ltd

and

Commissioners of Customs & Excise

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

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet, J. C. Moitinho de Almeida (Rapporteur), C. Gulmann and P. Jann, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the appellant in the main proceedings, by Andrew Thornhill QC, Roger Thomas and Julie Anderson, Barristers, instructed by Cameron Markby Hewitt, Solicitors,

— the United Kingdom, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Paul Lasok QC,

— the Commission of the European Communities, by Thomas F. Cusack, Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the appellant in the main proceedings, represented by Andrew Thornhill and Roger Thomas, the United Kingdom, represented by Paul Lasok and Melanie Hall, Barrister, and of the Commission, represented by Thomas F. Cusack, at the hearing on 5 October 1995,

after hearing the Opinion of the Advocate General at the sitting on 7 December 1995,

gives the following

Judgment

1 By order of 16 May 1994, received at the Court on 13 June 1994, the Value Added Tax Tribunal, London, referred for a preliminary ruling under Article 177 of the EC Treaty a number of questions concerning the interpretation 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 (OJ 1977 L 145, p. 1) (hereinafter 'the Directive').

2 Those questions have arisen in a dispute between Wellcome Trust Ltd (hereinafter 'the Trust' or 'the appellant'), acting as sole trustee for the Wellcome Trust, a charitable trust, and the Commissioners of Customs & Excise (hereinafter 'the Commissioners') concerning an application for refund of input value added tax ('VAT') paid in connection with a sale of shares and corresponding to the proportion of shares sold to purchasers outside the European Community.

3 In 1924, the Wellcome Foundation Ltd (hereinafter 'the Foundation') took over the pharmaceutical business of Burroughs, Wellcome and Co., founded as a partnership in 1880 by two pharmacists, Silas Burroughs and Henry Wellcome. Sir Henry Wellcome, who died in 1936, provided in his will that the management of

all his shares in the Foundation was to be entrusted to the Wellcome Trust, the trustees of which were to use the proceeds from the shares for research into human and animal medicine and for the study of the history of medicine. Pursuant to a court order of 1 June 1992, the appellant was appointed to act as sole trustee in place of the natural persons who had previously exercised that function.

4 In 1980, the value of the Trust's holding in the Foundation was £250 million. In 1984, it was considered prudent to diversify this holding, the assets of the Trust having consisted until then of shares and securities in the Foundation.

5 In 1985, the Charity Commissioners drew up a scheme authorizing the sale of part of the shareholding in the Foundation, subject to the condition that the Trust retained 50% of its voting shares. The shares in the Foundation were also exchanged for shares in a new holding company, Wellcome plc.

6 The sale effected in 1985 made available £200 million, which was used for making other investments.

7 By a court order of July 1987, the Trust's investment powers were widened considerably. However, the order required the trustees to make all reasonable efforts to avoid engaging in trade when exercising their investment powers.

8 It also appears from the order for reference that, at the end of September 1991, the Trust's investment portfolio was valued at £277 million. Purchases in that year amounted to £126 million, while sales totalled £94 million. Turnover in fixed investment securities amounted to £44 million and was greater than that relating to shares. The remaining assets consisted of 632 million shares in Wellcome plc, valued at £4 772 million, term deposits of £57.5 million, bank deposits and cash amounting to £12.5 million, along with debts, prepayments and tax credits totalling £4.2 million. Liabilities were £102 million, of which £92 million was for grants committed but not yet paid. Expenditure was £78 million, of which £61 million was on grants and £10 million on direct research. Total income for the year was £90.2 million, of which £67.4 million came from dividends from Wellcome plc; quoted dividends and interest came to £13.7 million and interest on term and bank deposits was £9.7 million. There was a loss of £670 000 on disposal of shares and securities.

9 On 2 March 1992, a joint statement made by the Trust and Wellcome plc gave details of the sale of a further tranche of shares by Wellcome plc (hereinafter 'the Second Share Sale'). By a court order of 30 April 1992, approval was granted for an extension of the Trust's powers with regard to the sale of securities, subject to the condition that the Trust retain 214 951 378 shares in Wellcome plc.

10 Since the scale of the Second Share Sale had been considered too big to be carried out through normal channels, namely by public subscription, it was decided to use

the 'bookbuilding' method, a form of auction under which potential investors are given the opportunity to submit tenders for shares during a predetermined period, at the end of which the size and price of the offer are fixed in light of demand. This method of sale involved a long period of planning and considerable fees for the services of lawyers, financial consultants and public-relations experts, whose involvement was required in order to carry out the transaction.

11 The tender period began on 6 July 1992. The public offer closed on 21 July 1992, while the tender period ended some five days later. 288 million shares were sold at £8 per share, 33.22% of which went to purchasers outside the Community. The aim of the sale by tender was to raise funds for purposes of more diversified reinvestment. In fact, the transaction raised £2.18 billion. As in 1987, the Trust allocated the management of the funds to outside institutions, while keeping a very close watch on their results. Investments in excess of £1.8 billion were made prior to 15 September 1992.

12 According to the order for reference, the Trust is also authorized to invest in options and a variety of other instruments not traditionally regarded as investments. At the time of the hearing, investments in futures and options represented between 1% and 2% of total investments. Their use is entirely defensive and non-speculative. The Trust's Director of Finance monitors all portfolios in order to ensure that the Trust does not accidentally acquire a reportable interest in any company.

13 Around the same time, investments of approximately £72 million had been made in a property portfolio including offices, shops and a distribution warehouse. In respect of some of the properties, the Trust elected to waive the exemption provided for by the 1983 Value Added Tax Act ('the 1983 VAT Act'), an option

permitted under Article 13C(a) of the Directive. The Trust also invests in venture capital projects, which are limited in time and liability. Finally, quite apart from any investment in marketable securities, the Trust earns interest from cash balances by making direct loans to institutions and banks.

14 By letter of 11 March 1993, the Trust, relying on Article 17(3)(c) of the Directive, applied for a refund of £297 832.65 as input VAT on expenditure incurred in the preparation of the Second Share Sale, which the Trust considers to be an economic activity within the meaning of the Directive. This amount represented 33.22% of the total tax paid on the expenditure incurred and corresponds to the percentage of shares sold to persons resident outside the Community.

15 Article 17(3)(c) of the Directive requires Member States to grant to every taxable person the right to a deduction or refund of the VAT due or paid in respect of goods or services supplied or to be supplied to him by another taxable person in so far as they are used for the purposes of:

'...

(c) 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'.

16 Under Article 13B(d)(5) of the Directive, the following are exempted:

'transactions, including negotiation, excluding management and safekeeping, 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)'.

17 Under section 2(1) of the 1983 VAT Act, VAT is chargeable on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

18 By decision of 20 March 1993, the Commissioners rejected the above application on the ground that the shares and other securities held by the Trust were held for charitable purposes and that the disposals in question had not been made in the course or furtherance of any business carried on by the Trust, but in pursuance of the normal management of investments in order to fund charitable activities. Consequently, they concluded that the sums of tax charged on the provision of the professional services of which the Trust had availed itself in connection with the Second Share Sale did not constitute input tax for the purposes of the 1983 VAT Act.

19 The Trust appealed against that decision to the Value Added Tax Tribunal, London. According to the Tribunal, the issue is whether the appellant is a taxable

person, either in relation to its activities specifically connected with the Second Share Sale or in relation to its general investment activities, of which that sale was a part.

20 The Value Added Tax Tribunal therefore decided to stay the proceedings until the Court has given a preliminary ruling on the following questions:

'(1) Is the term "economic activities" in Article 4(2) [of the Directive] capable of covering sales of shares and securities by a person who is not a dealer in shares and securities?

(2) Can a multiplicity of share sales by a person who is not a dealer in shares to a large number of purchasers on the same day involving sophisticated preparation over a considerable period of time of itself constitute "economic activities" within Article 4(2)?

(3) If the reply to Question 1 and/or 2 is in the affirmative, are share sales by such a trustee to be regarded as effected by a "taxable person acting as such" within Article 2(1)?

(4) In answering Questions 1 and/or 2 and/or 3, is it relevant to consider whether the sale of shares and securities is the predominant concern of the activity in

the course of which the sales take place; and, if so, how should such activity and its extent be defined?'

The questions submitted for a preliminary ruling

21 By the questions which it has submitted for a preliminary ruling, the national tribunal is essentially seeking to ascertain whether the concept of economic activities, within the meaning of Article 4(2) of the Directive, is to be interpreted as including an activity, such as that at issue in the main proceedings, consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust.

22 The appellant takes the view that this question must be answered in the affirmative.

23 The appellant points out that, while investments made by ordinary investors do not come within the scope of VAT, the position is different where, by reason of its status or the functions which it exercises, an investor regularly makes investments for the purpose of generating revenue or increasing its capital. That, it contends, is the position in the present case.

24 In that respect, like an investment trust or a pension fund, whose investment activity is treated in the United Kingdom as coming within the scope of VAT, the appellant, too, must ensure that its capital increases within reasonable proportions, which necessitates regular sales of shares and other securities.

25 The appellant adds that it would also run counter to the principle of fiscal neutrality were VAT to be charged on the sale or purchase of shares by a professional dealer but not on those made by an investor such as the Trust. VAT must be applied to all economic activities, whatever their nature, without regard to the purpose or results of the activities themselves. It is irrelevant whether the purpose or object of an economic activity is trading or investment.

26 With particular regard to the Second Share Sale, the appellant submits that there can be no doubt that the activity in question amounts to an economic activity. If, instead of carrying out the Second Share Sale in one day, the Trust had carried out several sales over the course of 1991 and 1992, the regularity of the sales would have made that course of activity an economic activity. The fact that, for technical reasons, the Trust ruled out that procedure cannot make the Second Share Sale any less an economic activity within the meaning of the Directive. Consequently, supplies of substantial value, made, as in this case, in a short space of time, constitute an economic activity.

27 That argument cannot be accepted.

28 Article 2(1) of the Directive applies VAT to the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

29 Article 4(1) of the Directive provides that 'taxable person' is to 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'.

30 'Economic activities' are defined in Article 4(2) as comprising 'all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions'. Article 4(2) goes on to provide that: '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.'

31 Although, as is clear from the information provided in the order for reference, the Trust does not have the status of a professional dealer in securities in the United Kingdom, that fact does not necessarily mean that an activity, such as that at issue in the main proceedings, consisting in the acquisition and sale of shares and other securities cannot, in some cases, be treated as an economic activity within the meaning of Article 4 of the Directive. According to the Court's case-law (see the judgment in Case C-60/90 *Polysar Investments Netherlands* v *Inspecteur der Invoerrechten en Accijnzen, Arnhem* [1991] ECR I-3111, paragraph 12), Article 4 confers a very wide scope on VAT.

32 However, it is also clear from that case-law that mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity. The Court has so held with regard to financial holdings acquired by holding companies in other undertakings (see, in particular, the judgments in *Polysar Investments Netherlands*, cited above, paragraph 13, and in Case C-333/91 *Sofitam* v *Ministre chargé du Budget* [1993] ECR I-3513, paragraph 12).

33 As the Commission appositely pointed out, if such activities do not in themselves constitute an economic activity within the meaning of the Directive, the same must be true of activities consisting in the sale of such holdings.

34 Now, the Trust manages the assets it holds, consisting in part of its shareholding in the Foundation and of other financial instruments. Its investment activities, as described above, consist essentially in the acquisition and sale of shares and other securities with a view to maximizing the dividends and capital yields which are destined for the promotion of medical research.

35 It is true that, by virtue of Article 13B(d)(5) of the Directive, transactions in shares, interests in companies or associations, debentures and other securities may fall within the scope of VAT. This will be the case, in particular, where such transactions are effected as part of a commercial share-dealing activity or in order to secure a direct or indirect involvement in the management of the companies in which the holding has been acquired (*Polysar Investments Netherlands*, cited above, paragraph 14). However, as is clear from the order for reference, the Trust is forbidden to engage in precisely such activities, being required to make all reasonable efforts to avoid engaging in trade when exercising its powers and being precluded from taking majority holdings in other companies.

36 Consequently, and irrespective whether the activities in question are similar to those of an investment trust or a pension fund, the conclusion must be that a trust which is in a position such as that described by the referring tribunal must, in the light of Article 4 of the Directive, be regarded as confining its activities to managing an investment portfolio in the same way as a private investor.

37 Furthermore, contrary to the arguments of the appellant, neither the scale of a share sale, such as the Second Share Sale carried out in this case, nor the employment, in connection with such a sale, of consultancy undertakings can constitute criteria for distinguishing between the activities of a private investor, which fall outside the scope of the Directive, and those of an investor whose transactions

constitute an economic activity. Apart from the fact that large share sales may also be carried out by private investors, the appellant's argument, if accepted, would mean that the classification of a transaction as an economic activity would depend on the investor's skill and experience.

38 As far as the principle of fiscal neutrality is concerned, this does not have the significance attributed to it by the appellant. While it requires that all economic activities should be treated in the same way, it also assumes that the activity in question can be classified as an economic activity, which is not the position in this case.

39 Furthermore, as the Advocate General observes in point 27 of his Opinion, to treat the Trust's activities as an economic activity within the meaning of the Directive and accordingly allow input VAT to be deducted would place an investor such as the Trust at an advantage *vis-à-vis* other private investors, who could not deduct input VAT under Article 17(3)(c) of the Directive where their customers are established outside the Community.

40 Finally, in view of the foregoing, whether or not the sale of shares and other securities is the predominant concern of the activity in the course of which the sales in question took place cannot affect the classification, for the purposes of Article 4 of the Directive, of the investment activity of the claimant in this case.

41 The reply to the questions submitted by the national VAT tribunal must therefore be that the concept of economic activities, within the meaning of Article 4(2) of the Directive, is to be interpreted as not including an activity, such as that at issue

in the main proceedings, consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust.

Costs

42 The costs incurred by the United Kingdom and the Commission of the European Communities, 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 (Fifth Chamber),

in answer to the questions referred to it by the Value Added Tax Tribunal, London, by order of 16 May 1994, hereby rules:

The concept of economic activities, within the meaning of Article 4(2) 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, is to be interpreted as not including an activity, such as that at issue in the main proceedings, consisting

in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust.

Edward Puissochet Moitinho de Almeida

Gulmann Jann

Delivered in open court in Luxembourg on 20 June 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber