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## 61981J0222

Judgment of the Court (First Chamber) of 1 July 1982. - BAZ Bausystem AG v Finanzamt München für Körperschaften. - Reference for a preliminary ruling: Finanzgericht München - Germany. - Value added tax - Interest on account of late payment. - Case 222/81.

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### Keywords

*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 ) )*

### Summary

*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 .*

### Parties

*IN CASE 222/81*

*REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE FINANZGERICHT MUNCHEN ( FINANCE COURT , MUNICH ) FOR A PRELIMINARY RULING*

IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

B.A.Z. BAUSYSTEM AG , ZURICH ( SWITZERLAND ),

AND

FINANZAMT MUNCHEN FUR KORPERSCHAFTEN ( MUNICH REVENUE OFFICE FOR CORPORATIONS ),

## **Subject of the case**

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 ),

## **Grounds**

1 BY AN ORDER OF 30 JUNE 1981 , WHICH WAS RECEIVED AT THE COURT ON 22 JULY 1981 , THE FINANZGERICHT MUNCHEN ( 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 , ZURICH ( 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 SUBCONTRACTED 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 MUNCHEN ( REGIONAL COURT , MUNICH ). UPON APPEAL AGAINST THAT DECISION BY THE CONSORTIUM , THE OBERLANDESGERICHT MUNCHEN ( 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 MUNCHEN , WHICH HAS REFERRED TO THE COURT FOR A PRELIMINARY RULING THE FOLLOWING QUESTION :

'' HOW IS THE EXPRESSION ' WERT DER GEGENLEISTUNG ' ( VALUE OF THE CONSIDERATION ) 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 :

'' 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 BURGERLICHES 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 .

## **Decision on costs**

### **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 .

## **Operative part**

ON THOSE GROUNDS ,

THE COURT ( FIRST CHAMBER ),

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE FINANZGERICHT MUNCHEN 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 .