

JUDGMENT OF THE COURT  
2 February 1988

In Case 36/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the Højesteret (Supreme Court), Denmark, for a preliminary ruling in the proceedings pending before that court between

**Ministeriet for Skatter og Afgifter** (Ministry of Fiscal Affairs)

and

**Investeringsforeningen Dansk Sparinvest**

on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (Official Journal, English Special Edition 1969 (II), p. 412),

THE COURT

composed of: Lord Mackenzie Stuart, President, J. C. Moitinho de Almeida (President of Chamber), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz

Registrar: H. A. Rühi, Principal Administrator

after considering the observations submitted on behalf of:

- (i) the Investeringsforeningen Dansk Sparinvest, the respondent to the appeal, by Egon Høgh, advocate,
- (ii) the Danish Government and Ministeriet for Skatter og Afgifter, the appellants, by Laurids Mikaelson and Elkier Andersen in the written procedure and O. Fentz in the oral procedure,
- (iii) the Netherlands Government, by E. F. Jacobs, Secretary- General acting on behalf of the Minister for Foreign Affairs,
- (iv) the Commission of the European Communities, by its Legal Adviser, Johannes Føns Buhl,

having regard to the Report for the Hearing and further to the hearing on 19 May 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 July 1987,

gives the following

**Judgment**

- 1 By a decision of 28 January 1986, received at the Court on 11 February 1986, the Højesteret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Directive 69/335 of the Council of 17 July 1969 concerning indirect taxes on the raising of capital.

- 2 Those questions were raised in proceedings before that court between Investeringsforeningen Dansk Sparinvest (hereinafter referred to as 'Dansk Sparinvest'), an investment society, and Ministeriet for Skatter og Afgifter relating to the capital duty collected on the issue by Dansk Sparinvest of certificates representing a proportionate part of the assets of its Section C, which is an independent accumulating fund.
- 3 It is common ground between the parties to the main proceedings that Section C of Dansk Sparinvest is a capital company within the meaning of Article 3 of Directive 69/335.
- 4 In 1979, changes in Danish law necessitated an amendment to the form of the certificates which had been used until then. Dansk Sparinvest decided to take advantage of the opportunity not only to distribute new certificates but also to make them more negotiable. At the material time their nominal value was DKR 1 000 and their actual value was DKR 2 000. Thus two new certificates, each having a nominal value of DKR 1 000, were issued and delivered to the shareholders in exchange for one old certificate.
- 5 The Danish revenue authority took the view that the transaction could be likened to the issue of free shares in a company limited by shares or in a limited liability company and claimed that the increase in the nominal capital constituted a capitalization of profits or of permanent or temporary reserves within the meaning of the Danish statute which transposes Article 4 (2) (a) of Directive 69/335 into national law. Dansk Sparinvest brought an action against that decision.
- 6 Taking the view that the proceedings raised questions concerning the interpretation of Community law the Højesteret, before which the matter had come on appeal, stayed the proceedings until the Court had given a preliminary ruling on the following questions :  
'(1) Are Articles 10 and 11 of the Council Directive of 17 July 1969 concerning indirect taxes on the raising of capital to be interpreted as meaning that, in respect of the transactions mentioned in those articles, it is not permissible for a Member State to subject capital companies, within the meaning of Article 3 of the directive, to taxes or duties other than capital duty and the duties mentioned in Article 12?  
(2) Is Article 4 (2) (a) of the directive to be interpreted as meaning that an increase in company capital effected by a transfer to it of the assets mentioned in that provision is a precondition for the charging of capital duty within the meaning of the said provision or is a Member State entitled to charge capital duty solely on the basis of an increase in nominal capital?'
- 7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and of the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

### **The first question**

- 8 In its first question the Højesteret asks whether Articles 10 and 11 of Council Directive 69/335 should be interpreted as meaning that a Member State is authorized to subject capital companies within the meaning of Article 3 of the directive, in respect of the transactions set out in Articles 10 and 11 thereof, to taxes or duties other than capital duty and the duties mentioned in Article 12.

- 9 According to the last recital in the preamble to Directive 69/335 the retention of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this directive and those taxes should therefore be abolished. Article 12 of the directive must therefore be interpreted as meaning that, as a reading of the combined provisions of Articles 10, 11 and 12 confirms, it establishes an exhaustive list of taxes and duties other than capital duty which affect capital companies in connection with the transactions referred to in Articles 10 and 11.
- 10 The answer to the first question must therefore be that Articles 10 and 11 of Directive 69/335 must be interpreted as meaning that, in respect of the transactions mentioned in those articles, it is not permissible for a Member State to subject capital companies within the meaning of Article 3 of the directive to taxes or duties other than capital duty and the duties mentioned in Article 12.

### **The second question**

- 11 In its second question the Højesteret asks whether Article 4 (2) (a) of the directive is to be interpreted as applying only to an increase in the capital of a capital company effected by capitalization of profits or of permanent or temporary reserves, or whether a Member State is entitled to charge capital duty solely on the basis of an increase in nominal capital.
- 12 Article 4 (2) (a) of Directive 69/335, as amended by Article 1 of Council Directive 85/303 of 10 June 1985 amending Directive 69/335 concerning indirect taxes on the raising of capital (Official Journal 1985, L 156, p. 23) provides:  
'The following transactions may, to the extent that they were taxed at the rate of 1% as at 1 July 1984, continue to be subject to capital duty:  
(a) an increase in the capital of a capital company by capitalization of profits or of permanent or temporary reserves;  
...'
- 13 It must be observed that Article 4 (2) (a) covers transactions where the increase in capital arises from the company's own resources. A transaction according to the terms of that provision involves the capitalization of profits or of permanent or temporary reserves. Such a transfer assumes the existence of two funds, namely the capital, which is separate and distinct and serves as a guarantee for those who have dealings with the company and constitutes evidence of its economic strength, and on the other hand the profits and permanent or temporary reserves, funds which are at the disposal of the shareholders and cease to be under their control when they are capitalized. It is such a transaction which, according to the judgment of the Court of 15 July 1982 in Case 270/81 *Rickmers-Linie KG & Co. v Finanzam für Verkehrsteuern* [1982] ECR 2771, constitutes in law a raising of capital which contributes to increasing the company's economic potential.
- 14 On the other hand in the case of an investment company such as Dansk Sparinvest there is only a single fund covering all the assets. In the case of a transaction such as the one in point in this case the assets of the investment company and the proportion of those assets held by each certificate holder remain the same as they were before the

transaction at issue. In such circumstances there cannot be said to have been a transfer of the assets referred to in Article 4 (2) (a) leading to an increase in capital and it must be held that the transaction does not contribute to the strengthening of the economic potential of the company.

- 15 The reply to the second question must therefore be that Article 4 (2) (a) of Directive 69/335 must be interpreted as meaning that it applies only to an increase in the capital of a capital company by capitalization of profits or of permanent or temporary reserves and that a Member State is not entitled to charge capital duty solely on the basis of an increase in the nominal capital which does not contribute to the strengthening of the economic potential of the company.

### **Costs**

- 16 The costs incurred by the Danish Government, the Netherlands 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 proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds

THE COURT ,

in answer to the questions referred to it by the Højesteret by decision of 28 January 1986, hereby rules that:

- (1) Articles 10 and 11 of Directive 69/335 must be interpreted as meaning that, in respect of the transactions mentioned in those articles, it is not permissible for a Member State to subject capital companies within the meaning of Article 3 of the directive to taxes or duties other than capital duty and the duties mentioned in Article 12.**
- (2) Article 4 (2) (a) of Directive 69/335 must be interpreted as meaning that it applies only to an increase in the capital of a capital company by capitalization of profits or of permanent or temporary reserves and that a Member State is not entitled to charge capital duty solely on the basis of an increase in the nominal capital which does not contribute to the strengthening of the economic potential of the company.**