

JUDGMENT OF THE COURT (First Chamber)
13 October 1992

In Case C-49/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Weber Haus GmbH & Co. KG

and

Finanzamt Freiburg-Land,

on the interpretation of Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969(11), p. 412),

THE COURT (First Chamber),

composed of: G. C. Rodriguez Iglesias, President of the Chamber, R. Joliét and D. A. O. Edward, Judges,

Advocate General: F. G. Jacobs,

Registrar: H. A. Rühi, Principal Administrator,

after considering the written observations submitted on behalf of:

— Weber Haus GmbH & Co. KG, by Armin Grothe, Wirtschaftsprüfer and Steuerberater, Frankfurt am Main,

— the Commission of the European Communities, by Henri Étienne, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Weber Haus GmbH & Co. KG, represented by Christiane Schubert, Steuerberaterin, and of the Commission at the hearing on 2 April 1992,

after hearing the Opinion of the Advocate General at the sitting on 14 May 1992,

gives the following

Judgment

- 1 By order of 31 October 1990, received at the Court on 4 February 1991, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969(11), p. 412, hereinafter 'the directive').
- 2 Those questions were raised in proceedings between the limited partnership Weber Haus GmbH & Co. KG (hereinafter 'Weber Haus') and the Finanzamt (Tax Office) Freiburg-Land on the charging of capital duty on the profits transferred to Weber Haus by a limited company, the GmbH, belonging to the same group.

- 3 The group to which Weber Haus and the GmbH belong manufactures and assembles prefabricated houses. Over 99% of both Weber Haus and the GmbH belongs to Mr and Mrs W. Their shares in the GmbH are, however, held by Weber Haus, which exercises the rights associated with those shares and is thereby entitled to receive any profits which are distributed. In addition, Weber Haus and the GmbH have concluded an agreement under which the profits of the GmbH are to be transferred to Weber Haus, which is in turn obliged to absorb the GmbH's losses.
- 4 In 1977 the GmbH made a profit of DM 5 666 634, which it transferred to Weber Haus in accordance with the said agreement. That transaction was subjected to capital duty by the Finanzamt on the ground that it was in reality a payment by Mr and Mrs W. to Weber Haus through the GmbH, disguised as a transaction between Weber Haus and the GmbH. The Finanzamt based its decision on Paragraph 4 of the German Kapitalverkehrsteuergesetz (Capital Transfer Tax Law), which reads as follows:
'Liability to tax is not excluded by the fact that services (...) are provided not by members but by associations of which those members are members or partners.'
- 5 The case came before the Bundesfinanzhof, which considered the question whether that provision was compatible with Article 4(2)(b) of Directive 69/335/EEC. The latter provision states that an increase in the assets of a capital company 'through the provision of services by a member' may be subject to capital duty, but does not deal with the case where a member provides services through another company also controlled by him.
- 6 In those circumstances the Bundesfinanzhof stayed the proceedings and referred the following two questions to the Court for a preliminary ruling:
'(1) Are Member States permitted under Article 4(2)(b) of Directive 69/335/EEC to tax payments made, not by a member of the company, but by an association of which the member is also a shareholder or member, under a profit transfer agreement concluded with the company?
(2) If the first question is answered in the affirmative, is the taxable payment under Article 4(2)(b) made at the time that the profit transfer agreement takes effect in civil law or only at the time that the profits are actually transferred?'
- 7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Question 1

- 8 In Question 1 the national court asks whether a transfer of profits from one company to another, where both are controlled by the same member, may be subject to capital duty under Article 4(2)(b) of Directive 69/335/EEC.
- 9 In order to answer that question, it should first be borne in mind that under that provision of the directive, services provided by a member which increase the assets of a capital company may be subject to capital duty, even though they do not entail an increase in the company's capital, provided that they result in variation in the rights in the company or are likely to increase the value of the company's shares.
- 10 A profit transfer in favour of a capital company, if it increases the assets of that company and is likely to increase the value of its shares, constitutes a service which may be subject to capital duty, if it is a service provided by a member.
- 11 A transfer of profits from one company to another, both being controlled by one and the same member, must be regarded as a service provided by a member within the meaning of the aforesaid provision of the directive if it is clear from the circumstances of the case that the transfer in fact constitutes a payment by that member to one company through the other.

- 12 However, a transfer of profits cannot be regarded as a capital contribution if the company which receives the sums transferred is a member of or shareholder in the company transferring them and is thereby entitled to receive income therefrom; such an operation must in fact be equated with a distribution of dividends, which by its nature cannot be subject to capital duty.
- 13 It follows that the answer to Question 1 must be that under Article 4(2)(b) of Directive 69/335/EEC, capital duty may be charged on a transfer of profits from one company to another where both are controlled by one and the same member, if it is clear from the circumstances of the case that the transfer constitutes a payment by that member to one company through the other. However, such a transaction cannot be subjected to capital duty if the company which receives the profits is a member of or shareholder in the company which transfers them.

Question 2

- 14 In view of the answer to Question 1, there is no need to answer Question 2.

Costs

- 15 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 questions referred to it by the Bundesfinanzhof by order of 31 October 1990, hereby rules:

Under Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, capital duty may be charged on a transfer of profits from one company to another where both are controlled by one and the same member, if it is clear from the circumstances of the case that the transfer constitutes a payment by that member to one company through the other. However, such a transaction cannot be subjected to capital duty if the company which receives the profits is a member of or shareholder in the company which transfers them.