

JUDGMENT OF THE COURT (Sixth Chamber)

11 December 1997

(Directive 69/335/EEC - Contribution of immovable property)

In Case C-42/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale Civile e Penale di Venezia (Italy) for a preliminary ruling in the proceedings pending before that court between

**Società Immobiliare SIF SpA**

and

**Amministrazione delle Finanze dello Stato**

on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 73/79/EEC of 9 April 1973 varying the field of application of the reduced rate of capital duty provided for in respect of certain company reconstruction operations by Article 7(1)(b) of the directive concerning indirect taxes on the raising of capital (OJ 1973 L 103, p. 13), by Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15), by Council Directive 74/553/EEC of 7 November 1974 amending Article 5(2) of Directive 69/335 (OJ 1974 L 303, p. 9), and by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335 (OJ 1985 L 156, p. 23),

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm (Rapporteur), President of the Chamber, G.F. Mancini and G. Hirsch, Judges,

Advocate General: G. Cosmas,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Società Immobiliare SIF SpA, by Riccardo Rocca, of the Padua Bar, and Mauro Ferruzzi, of the Venice Bar,
- the Italian Government, by Professor Umberto Leanza, Head of the Legal Department at the Ministry of Foreign Affairs, acting as Agent, assisted by Maurizio Fiorilli, Avvocato dello Stato,
- the Greek Government, by Vassileios Kontolaimos, Deputy Legal Adviser with the State Legal Service, and Maria Basdeki, Legal Agent with that service, acting as Agents,

- the Commission of the European Communities, by Enrico Traversa and Hélène Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Società Immobiliare SIF SpA, represented by Riccardo Rocca; the Italian Government, represented by Gianni De Bellis, Avvocato dello Stato; the Greek Government, represented by Vassileios Kontolaimos; and the Commission, represented by Enrico Traversa, at the hearing on 7 May 1997,

after hearing the Opinion of the Advocate General at the sitting on 26 June 1997,

gives the following

### **Judgment**

1. By order of 2 February 1996, received at the Court on 13 February 1996, the Tribunale Civile e Penale (Civil and Criminal District Court), Venice, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 73/79/EEC of 9 April 1973 varying the field of application of the reduced rate of capital duty provided for in respect of certain company reconstruction operations by Article 7(1)(b) of the directive concerning indirect taxes on the raising of capital (OJ 1973 L 103, p. 13), by Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15), by Council Directive 74/553/EEC of 7 November 1974 amending Article 5(2) of Directive 69/335 (OJ 1974 L 303, p. 9), and by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335 (OJ 1985 L 156, p. 23; hereinafter 'the Directive').
2. Those questions were raised in proceedings brought by Società Immobiliare SIF SpA (hereinafter 'SIF') against the Amministrazione delle Finanze dello Stato (hereinafter 'the tax authorities') following the latter's refusal to reimburse to SIF the sum of LIT 772 228 000 charged pursuant to Italian legislation on the taxation of transactions involving the contribution of immovable property to a capital company.
3. The Directive is aimed in particular at achieving harmonization of the factors involved in the fixing and levying of capital duty in the Community, by means of the elimination of tax obstacles which interfere with the free movement of capital.
4. Article 4(1) of the Directive lists the transactions which are subject to capital duty, one of which is the increase in the capital of a capital company by contribution of assets of any kind (point (c)).
5. Pursuant to Article 7 of the Directive, as amended by Directive 85/303, the contribution of assets of any kind is a transaction on which duty may be charged at a single rate not exceeding 1%.
6. Article 10 of the Directive provides that, apart from capital duty, Member States are not to charge, with regard to companies, firms, associations or legal persons operating for

profit, any taxes whatsoever *inter alia* in respect of the transactions referred to in Article 4.

7. However, Article 12 of the Directive provides that, notwithstanding Articles 10 and 11, Member States may charge certain transfer duties.
8. In Italy, the registration charge ('imposta di registro) is governed by Presidential Decree No 131 of 26 April 1986 (Ordinary Supplement to GURI No 99 of 30 April 1986). Corporate transactions of any kind, including an increase in company capital or assets through the transfer of ownership of immovable property specifically intended for commercial use or of a right *in rem* over such property, are subject to registration. The charge is levied at the rate of 4%, calculated by reference to the value of the immovable property transferred where the contribution is specifically intended for commercial use.
9. The mortgage registration fee ('imposta ipotecaria) is governed by Legislative Decree No 347 of 31 October 1990 concerning the provisions relating to charges for transcription and entry in the Land Register (Ordinary Supplement No 75 to GURI No 277 of 27 November 1990). That fee is payable on certain formalities connected with mortgages, namely transcription, registration, renewal and annotation of deeds in the Land Register. The relevant basis of assessment is the value of the immovable property transferred or contributed and the rate is fixed at 1.6%.
10. The Land Register fee ('imposta catastale) is also governed by Legislative Decree No 347 and applies to the transfer, namely the change in the name of the owner of immovable property entered in the Land Register or holder of a right *in rem* over such property. That fee, which is applied at the rate of 0.4%, is proportional to the value of the property.
11. The municipal charge on the appreciation of immovable property ('imposta comunale sull'incremento di valore dei beni immobili, hereinafter 'the Invim) was introduced by Presidential Decree No 643 of 26 October 1972 (Ordinary Supplement No 3 to GURI No 292 of 11 November 1972), and was subsequently abolished with effect from 1 January 1993 by Article 17 of Legislative Decree No 504 of 30 December 1992 (Ordinary Supplement No 137 to GURI No 305). The Invim is charged on the appreciation in the value of immovable property situated on Italian territory (Article 1). It is calculated either (i) when immovable property is transferred for consideration or contributed to companies or firms of any kind whatsoever (Article 2) or (ii) in the case of immovable property owned by companies, at the end of each 10-year period elapsing from the date of purchase (Article 3).
12. The basis of assessment for the Invim is the difference between the value of the immovable property at the time of its acquisition and its value at the time of purchase or contribution, plus any expenditure which has increased the value. For the purposes of calculating the difference in value of immovable property in case (ii), its value at the end of the 10-year period constitutes the final value, and its value at the time of purchase, or that last decided on for taxation purposes, constitutes the initial value (Article 6). There is a progressive rate of taxation, which depends on the taxable proportion of the gain in value and ranges between 3% and 30%, depending on the degree of appreciation.

13. Article 17 of Legislative Decree No 504 provides that, notwithstanding its abolition, the *Invim* may still be charged at the maximum rates on the gain in value accruing up to 31 December 1992, where the pre-conditions for its application have been fulfilled between 1 January 1993 and 1 January 2003. That transitional provision was the basis on which the members of SIF responsible for the transaction increasing the company's capital were taxed on the value gained by the property in question between the date of its purchase by them and 31 December 1992.
14. At SIF's extraordinary general meeting of 11 December 1992, the members transformed the company from a limited liability company into a joint-stock company, and at the same time approved a contribution to SIF of immovable property worth a total of LIT 8 712 600 000. That contribution brought about an increase of LIT 4 000 000 000 in the company's capital, which grew from LIT 290 000 000 to LIT 4 290 000 000 through the issue of 40 000 new shares worth LIT 100 000 each, plus a share premium of LIT 97 527.
15. By decision of 26 April 1993, the tax authorities demanded the sum of LIT 859 354 000 by way of payment in respect of the four charges at issue on the contribution of immovable property. On 17 June 1993 SIF paid that sum, but asked the tax authorities to reimburse LIT 772 228 000, being the difference between the amount paid and LIT 87 126 000, that is to say, the amount which SIF reckoned it would be liable to pay if the rate of 1% provided for by Article 7(2) of the Directive were applied. That claim was rejected by an implied decision.
16. By application lodged on 19 January 1994, SIF requested the national court to order the tax authorities to reimburse the sum of LIT 772 228 000 on the ground that the taxation of the contribution at issue was contrary to the Directive, which imposes a single rate of duty not exceeding 1%.
17. Taking the view that it was impossible to ascertain from the Directive whether the maximum rate of 1% had to be applied in the case before it, the *Tribunale Civile e Penale* decided to stay proceedings and to refer the following questions to the Court:
  - '(1) Are Articles 4, 7 and 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 73/80/EEC of 9 April 1973, applicable in the circumstances set out by the plaintiff?
  - (2) Does the application of those provisions preclude the charging of any other taxation, in particular the taxes imposed by the Italian Registry Office, including the *Invim* (*Imposta comunale sull'incremento di valore dei beni immobili* – Municipal tax on the increase in value of immovable property) and, if so, is the applicable rate 2% or the reduced rate?'
18. By its first question, the national court is essentially asking whether the four charges at issue in the main proceedings fall within the scope of the Directive. By its second question, it asks whether, if that is so, the Directive precludes their collection.

## Question 1

19. The first point to note is that, according to its title, the Directive concerns 'indirect taxes on the raising of capital'.
20. So far as concerns the Invim, SIF maintains that it must be regarded as capital duty for the purposes of the Directive whereas, according to the Italian and Greek Governments and the Commission, it is a direct tax and accordingly falls outside the scope of the Directive.
21. The Invim taxes the appreciation in the value of immovable property accruing to the owner when it is alienated for consideration or, in the case of immovables owned by companies, the notional appreciation in value on the expiry of a 10-year period, in accordance with the criteria laid down in Article 6 of Decree No 643.
22. Thus it is not the contribution as such which is taxed, but the gain generated by that contribution. Accordingly, a transaction whereby immovable property is contributed to a company is not subject to the Invim where the difference between the initial purchase value and the value of the contribution remains negative. Contribution is equated with alienation solely in order to identify the appropriate date for calculating the difference between the real value of immovable property and its value on the date of purchase.
23. Furthermore, the basis of assessment for the Invim is calculated, as required by Article 5(1)(a) of the Directive, not on the basis of the real value of the property contributed or to be contributed by the company's members, but on the gain in value accruing as a result of that contribution. Lastly, it is the contributor, not the recipient company, which is liable to pay the Invim.
24. It follows that the Invim, being a general charge on the appreciation in value of immovable property, does not constitute capital duty levied on an increase in capital by contribution of assets of any kind, within the meaning of Article 4(1)(c) of the Directive; nor, therefore, is it covered by the Directive.
25. The registration charge, the mortgage registration fee and the Land Register fee, for their part, are levied in respect of transactions involving the transfer of ownership of immovable property, including the contribution of property to a capital company. In the latter case, such charges and fees are covered by the Directive.
26. In those circumstances, the answer to the first question must be that, on a proper construction, the Directive does not apply to a national tax on any appreciation in the value of immovable property, determined at the time when such property was contributed to a capital company. However, the Directive does apply to the registration charge, the mortgage registration fee and the Land Register fee.

## Question 2

27. The first point to note is that, in order to give a useful answer to the national court, Article 12 of the Directive must be examined even though no interpretation of that provision was sought.

28. It is the Court's duty to interpret all provisions of Community law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 17).
29. The national court's second question should therefore be understood as asking whether Article 12 of the Directive authorizes Member States to charge — in respect of an increase in the capital of a capital company brought about by the contribution of immovable property — taxes such as the registration charge, the mortgage registration fee and the Land Register fee.
30. In that connection, the specific event giving rise to the registration charge, the mortgage registration fee and the Land Register fee is not the contribution of immovable property to a capital company. They are imposed on all transfers of ownership of immovable property, irrespective of the person who effects the transfer and of the form which it takes (sale, contribution to a company, donation, inheritance or adjudication).
31. However, as the Commission has rightly pointed out, the application of those three charges following a contribution of immovable property to a capital company is equivalent, in terms of its effects, to charging them on the contribution. Consequently, they constitute 'indirect taxes with the same characteristics as capital duty' which, according to the final recital in the preamble to the Directive, might frustrate the purpose of the measures provided for therein and which Article 10 thereof accordingly prohibits.
32. Article 12 of the Directive, however, authorizes Member States, notwithstanding Articles 10 and 11, to charge *inter alia* 'transfer duties, including land registration taxes, on the transfer, to a company, firm, association or legal person operating for profit, of businesses or immovable property situated within their territory (Article 12(1)(b)), provided that such duties and taxes do not exceed those which are applicable to like transactions in the Member State charging them(Article 12(2)).
33. It must therefore be determined whether the three charges at issue are covered by Article 12(1) of the Directive, which lays down an exhaustive list of duties and taxes other than capital duty which, notwithstanding Articles 10 and 11, may affect capital companies in connection with the transactions referred to in those latter provisions (see, to that effect, Case 36/86 *Ministeriet for Skatter og Afgifter v Dansk Sparinvest* [1988] ECR 409, paragraph 9, and Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 24).
34. The transfer duties referred to in Article 12(1)(b) of the Directive must be regarded as registration charges levied in connection with certain transactions involving the transfer of businesses or immovable property, on the basis of general and objective criteria.
35. That provision draws no distinction between the kinds of transfer duties which may be charged by the Member States. It permits Member States, in general terms, to charge — separately from capital duty, but in relation to a contribution to a capital company — duties in respect of which the operative event is objectively linked to the transfer of businesses or immovable property.

36. It follows that Article 12(1)(b) of the Directive permits Member States to levy, by way of duty on the transfer of immovable property, registration charges at a rate higher than the maximum rate of 1% laid down in Article 7(2) of the Directive, subject to the limit laid down in Article 12(2), second sentence, thereof.
37. It is for the national court to verify that the registration charge, the mortgage registration fee and the Land Register fee levied on the contribution of immovable property to a capital company do not exceed the charges and fees imposed on any other property transfer effected by private persons or by non-commercial companies.
38. In those circumstances, the answer to the second question must be that, on a proper construction, Article 12 of the Directive authorizes Member States, notwithstanding the prohibition laid down in Article 10 thereof, to charge, in connection with an increase in the capital of a capital company brought about by the contribution of immovable property, taxes such as the registration charge, the mortgage registration fee and the Land Register fee, provided that such taxes do not exceed those applicable to like transactions in the Member State charging them.

### **Costs**

39. The costs incurred by the Italian and Greek Governments and by 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunale Civile e Penale di Venezia by order of 2 February 1996, hereby rules:

- 1. On a proper construction, Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 73/79/EEC of 9 April 1973 varying the field of application of the reduced rate of capital duty provided for in respect of certain company reconstruction operations by Article 7(1)(b) of the directive concerning indirect taxes on the raising of capital, by Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty, by Council Directive 74/553/EEC of 7 November 1974 amending Article 5(2) of Directive 69/335, and by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335, does not apply to a national tax on any appreciation in the value of immovable property, determined at the time when such property was contributed to a capital company. However, Directive 69/335, as amended, does apply to the registration charge, the mortgage registration fee and the Land Register fee.**
- 2. On a proper construction, Article 12 of Directive 69/335, as amended, authorizes Member States, notwithstanding the prohibition laid down in Article 10 thereof, to charge, in connection with an increase in the capital of a capital company brought about by the contribution of immovable property, taxes such as the registration charge, the mortgage registration fee and the Land Register fee, provided that such taxes do not exceed those applicable to like transactions in the Member State charging them.**