

JUDGMENT OF THE COURT (Sixth Chamber)
27 October 1998

(Directive 69/335/EEC - Indirect taxes on the raising of capital - Merger of companies - Acquisition by a company which already holds all the securities of the companies acquired)

In Case C-152/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Commissione Tributaria Provinciale di Milano (Italy) for a preliminary ruling in the proceedings pending before that court between

Abruzzi Gas SpA (Agas)

and

Amministrazione Tributaria di Milano,

on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p.23),

THE COURT (Sixth Chamber),

composed of: G. Hirsch, President of the Second Chamber, acting for the President of the Sixth Chamber, G.F. Mancini, J.L. Murray, H. Ragnemalm (Rapporteur) and K.M. Ioannou, Judges,

Advocate General: G. Cosmas,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Italian Government, by Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Gianni De Bellis, Avvocato dello Stato,
- 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 the Italian Government and the Commission at the hearing on 30 April 1998,

after hearing the Opinion of the Advocate General at the sitting on 25 June 1998,

gives the following

Judgment

1. By order of 24 March 1997, received at the Court on 21 April 1997, the Commissione Tributaria Provinciale (Provincial Tax Court), Milan, referred for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23; hereinafter 'the Directive').
2. That question was raised in proceedings between Abruzzi Gas SpA (hereinafter 'Agas'), a company incorporated under Italian law, and the Amministrazione Tributaria di Milano (hereinafter 'the tax authority') concerning duty levied on the registration of a merger which took place through the acquisition by Agas of Briangas Spa (hereinafter 'Briangas') and Italgasdotti Serio Srl (hereinafter 'Italgasdotti').

The Directive

3. The aim of the Directive, as is clear from the preamble thereto, is to promote the free movement of capital, which is considered to be essential for the creation of an economic union whose characteristics are similar to those of a domestic market. Pursuit of that objective requires, so far as concerns taxes on the raising of capital, elimination of the duties previously in force in the Member States and their substitution by a duty charged only once, the level of which is the same in all Member States.
4. Article 4 of the Directive lists both the transactions on which payment of capital duty is compulsory and those which Member States may make subject to capital duty. It provides, in particular, that:
 - '1. The following transactions shall be subject to capital duty:
 - (a) the formation of a capital company;
 - (b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;
 - (c) an increase in the capital of a capital company by contribution of assets of any kind;
 - (d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;
 - ...
 2. 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 capitalisation of profits or of permanent or temporary reserves;
 - (b) an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which do result in variation in the rights in the company or which may increase the value of the company's shares;
 - ...'
5. Pursuant to Article 7 of the Directive, a transaction whereby a capital company transfers all its assets and liabilities to another capital company which is in the process of being

formed or which is already in existence may, subject to certain conditions, be wholly exempt from capital duty.

6. The last recital in the preamble to the Directive states that 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 the Directive. Those indirect taxes, the charging of which is prohibited, are listed inter alia in Articles 10 and 11 of the Directive. Article 10 provides:
'Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:
 - (a) in respect of the transactions referred to in article 4;
 - (b) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in article 4;
 - (c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form.'

Italian law

7. At the time of the registration of the merger document, which gave rise to the main proceedings, the relevant provisions were contained in Presidential Decree No 131 of 26 April 1986 (GURI No 99 of 30 April 1986; hereinafter 'Decree No 131').
8. Article 1 of Decree No 131 provided that registration duty was to be charged both on documents subject to compulsory registration and on those voluntarily submitted for registration.
9. In accordance with Article 2 of Decree No 131, documents subject to compulsory registration were listed in a tariff annexed to the Decree. Under Article 4 of that tariff, a duty of 1% is payable on registered documents concerning mergers or the division of companies.
10. The basis of assessment was governed by Article 50(4) of Decree No 131, which provided:
'In respect of mergers of companies of whatever kind, the basis of assessment is the amount corresponding to the assets referred to in Article 2501b of the Civil Code, the capital and reserves of the merged companies or, if the merger is effected through acquisition, of the companies acquired.'
11. Decree-Law No 323 of 20 June 1996 (GURI No 143 of 20 June 1996), converted into a law by Law No 425 of 8 August 1996 (GURI No 191 of 16 August 1996), replaced, with effect from 20 June 1996, the proportional duty of 1% with a flat-rate duty of LIT 250 000.

The dispute in the main proceedings

12. Since Agas held all the capital of Briangas, a public limited company, and of Italgasdotti, a private limited company, it was decided by the meeting of the shareholders and members of all three companies on 20 December 1994 that Agas should acquire Briangas and Italgasdotti. The merger did not entail any increase in Agas's share capital, but its shareholdings in the acquired companies were cancelled and entered in its own accounts as assets.
13. The effect of the merger transaction was that Briangas and Italgasdotti contributed to Agas assets with a net value of LIT 1 439 682 051 and LIT 22 105 502 520 respectively.
14. When the merger document was registered on 28 December 1994, the Ufficio del Registro Atti Pubblici di Milano (the office for the registration of public documents) levied LIT 236 052 000 by way of registration duty, applying a rate of 1% to the net assets of the acquired companies, on the basis of their assets as valued for the purposes of the merger document.
15. On 11 July 1996 Agas applied to the Ufficio del Registro for reimbursement of the registration duties paid, together with interest, claiming essentially that Article 4 of the tariff annexed to Decree No 131 infringed Articles 4 and 7 of the Directive.
16. On receiving no reply from the tax authority, Agas brought an action on 13 November 1996, contesting that decision before the Commissione Tributaria Provinciale, Milan.
17. Uncertain as to how the Directive ought to be interpreted, the Commissione Tributaria Provinciale, Milan, decided to stay proceedings pending a ruling from the Court of Justice on the following question:
'Do the provisions on the harmonisation of indirect taxes on contributions of capital to capital companies in the Union also include merger by acquisition of one company by another company which already owns 100% of the capital of the former?'

The question referred for a preliminary ruling

18. By that question, the national court is essentially asking whether the Directive precludes the levying of registration duty where companies are acquired by another company which already holds all their stocks and shares.
19. It is apparent from Article 1 of the Directive, read in conjunction with Article 4 thereof, that the duty levied on contributions to capital companies constitutes a 'capital duty' within the meaning of the Directive where it applies to transactions covered by the Directive (Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 31).
20. The transactions which are or may be rendered subject to the harmonised capital duty by the Member States are defined in Article 4 of the Directive objectively and with uniform application to all Member States, without reference to any specific aspects of their individual domestic legislation or to the way in which national tax systems are organised (*Bautiaa and Société Française Maritime*, paragraph 32).

21. Consequently, if the transaction in question is to fall within the scope of the Directive, it must be possible to bring it within one of the cases described in Article 4 thereof to which Article 10(a) and (b) of the Directive refer. That is in turn subject to the prohibition laid down in Article 10(c) of the Directive on taxation in respect of registration or any other formality required before the commencement of business, to which a company may be subject by reason of its legal form. That prohibition is justified by the fact that, even though the taxes in question are not levied on capital contributions as such, they are nevertheless levied on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the Directive (Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 23).
22. With reference to the present case, it should be noted, first of all, that a merger through acquisition by a company which already holds all the shares in the companies acquired does not entail any increase in the share capital of the acquiring company and does not therefore fall within the scope of Article 4(1)(c) of the Directive.
23. Nor does such a transaction fall within the scope of Article 4(1)(d) of the Directive.
24. Admittedly, the taking over by the acquiring company of the net assets and liabilities of the companies acquired may lead to an increase in its assets. According to the provision at issue, however, if such a transaction is to be compulsorily subject to capital duty, it must be in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation.
25. However, it is hardly likely that the consideration will take that form in the case of a merger through acquisition by a company which holds all the shares in the company acquired.
26. Lastly, it should be noted that a transaction such as that at issue in the main proceedings is not covered by Article 4(2)(b) of the Directive. That provision presupposes that the increase in the assets consists in the provision of services by a member, which is not the position here.
27. Secondly, as regards the applicability of Article 10(c) of the Directive, in a case such as that in point in the main proceedings, the registration duty does not appear to have been paid on the registration of a new capital company, that is to say, on completion of a formality required for the commencement of business. Furthermore, it was not levied on the registration of an increase in capital, necessary for the carrying on of that business (see, on that point, Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 22).
28. Consequently, the registration duty at issue in the main proceedings does not fall under the prohibition laid down in Article 10(c) of the Directive.
29. It must be concluded that, although one of the aims pursued by the Directive is to prevent transfers of assets between companies from being impeded by tax obstacles in

order to facilitate the reorganisation of undertakings (see to that effect Case C-50/91 *Commerz-Credit-Bank* [1992] ECR I-5225, paragraph 11), it does not apply to registration duty levied in respect of the acquisition of companies by a company which already holds all their share capital.

30. It should therefore be stated in reply to the question referred by the national court that the Directive does not preclude the levying of registration duty in respect of the acquisition of companies by a company which already holds all the shares in the companies acquired.

Costs

31. The costs incurred by the Commission, 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 proceedings 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 question referred to it by the Commissione Tributaria Provinciale di Milano by order of 24 March 1997, hereby rules:

Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, does not preclude the levying of registration duty in respect of the acquisition of companies by a company which already holds all the shares in the companies acquired.