

JUDGMENT OF THE COURT (Sixth Chamber)

17 December 1998

(Directive 69/335/EEC - Indirect taxes on the raising of capital - Tax on transfer of shares not listed on a Stock Exchange)

In Case **C-236/97**,

REFERENCE to the Court under Article 177 of the EC Treaty by the Østre Landsret, Denmark, for a preliminary ruling in the proceedings pending before that court between

Skatteministeriet

and

Aktieselskabet Forsikringsselskabet Codan

on the interpretation of Article 12(1)(a) of Directive 69/335/EEC of the Council of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412)

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, J.L. Murray, H. Ragnemalm (Rapporteur) R. Schintgen and K.M. Ioannou, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- the Skatteministeriet, by Elkiær Andersen, of the Copenhagen Bar,
- Aktieselskabet Forsikringsselskabet Codan, by Henrik Christrup, of the Copenhagen Bar,
- the French Government, by Kareen Rispal-Bellanger, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Foreign Affairs Secretary in that Directorate, acting as Agents,
- the Austrian Government, by Franz Cede, Ambassador, Federal Ministry of Foreign Affairs, acting as Agent,
- the Finnish Government, by Tuula Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by Hans Støvlbæk 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 Skatteministeriet, represented by Elkiær Andersen and Peter Biering, of the Copenhagen Bar, of Aktieselskabet Forsikringsselskabet Codan, represented by Henrik Christrup, of the French Government, represented by Sujiro Seam, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by Hans Støvlbæk at the hearing on 25 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1998,

gives the following

Judgment

1. By order of 24 June 1997, received at the Court on 27 June 1997, the Østre Landsret (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Directive 69/335/EEC of the Council of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412; hereinafter 'the Directive').
2. That question was raised in proceedings between the Skatteministeriet (hereinafter 'the Ministry of Taxation') and Aktieselskabet Forsikringsselskabet Codan (hereinafter 'Codan') relating to the payment of a tax on the transfer of shares.
3. The Directive is aimed in particular at achieving harmonisation of the factors involved in the fixing and levying of duty on the raising of capital to which investments in companies in the Community are subject, by means of the elimination of tax obstacles which interfere with the free movement of capital (see in particular Case C-347/96 *Solred* [1998] ECR I-937, paragraph 3).
4. Article 4 of the Directive sets out a list of transactions which must be subject to capital duty and those on which Member States may charge capital duty.
5. Under Article 10 of the Directive, apart from capital duty, Member States may not charge any taxes whatsoever in respect of certain transactions listed therein and in particular the transactions set out in Article 4. Article 11 of the Directive prohibits the taxation of certain other transactions.
6. Article 12(1)(a) of the Directive provides that, notwithstanding Articles 10 and 11, Member States may charge 'duties on the transfer of securities, whether charged at a flat rate or not'.
7. The wording of Article 12(1)(a) of the Directive is not identical in all the language versions thereof. The Danish and German versions have the equivalent of the term 'stock exchange turnover taxes' in place of 'duties on the transfer of securities'.
8. Paragraph 1(1) of Danish Law No 228 of 22 April 1987 on the tax due in the event of a transfer of shares provides:

'On the sale or exchange of Danish or foreign shares, negotiable share certificates, unit trust certificates or similar securities, duty shall be payable to the State in accordance with the rules contained in this Law.'

9. Paragraph 2 of Law No 228 provides that liability to pay duty arises at the time of the agreement to transfer the shares. Under Paragraph 4(1) of Law No 228 the duty is not payable, *inter alia*, on the first transfer by the issuer to the first acquiring party; where the issuer exchanges shares for new shares of the same kind and value; or where, in a merger situation, shares are transferred by the company which ceases to exist to the company which continues the activity or to the new company.
10. Under Paragraph 3 of Law No 228, the amount of the duty at the time of the transfer at issue in the main proceedings was 1% of the total value of the securities transferred. A subsequent amendment of the law reduced the tax to 0.5%.
11. Under Paragraph 5 of Law No 228, the duty is payable by the transferor unless he is resident abroad, in which case the duty is payable by the transferee.
12. Paragraph 4 of Law No 228 was amended later so that the duty is not payable where a party resident in Denmark purchases shares from a party resident abroad.
13. In June 1990 Codan entered into a contract with three British companies, Sun Insurance Office Ltd, The London Assurance and Alliance Assurance Co. Ltd which owned the entire share capital in the Danish company Fjerde SØ A/S (hereinafter 'Fjerde SØ'), relating to the acquisition of the entire share capital of Fjerde SØ. Fjerde SØ was not listed on the Stock Exchange. The value of the shares transferred was DKR 850 004 134.
14. The shares in Fjerde SØ were transferred by the British companies to Codan and, at an extraordinary general meeting on 5 July 1990, Codan resolved to increase its share capital by an amount equal to the value of the acquired shares. All the shares issued as a result of that increase were transferred to the British companies in payment for the share capital in Fjerde SØ.
15. Because it had increased its share capital, on 3 December 1991 Codan paid capital duty in accordance with Danish Law No 284 of 23 May 1973 on capital duty which implemented the Directive. The amount paid was equal to 1% of the value of the total raised amount, namely DKR 8 500 041.
16. However, the Danish tax authorities also demanded payment under Law No 228 of the 1% duty on the transfer of shares. Codan refused to pay that duty and so the Ministry of Taxation issued proceedings against it in the Østre Landsret for payment of DKR 8 500 041, being the amount of the duty together with interest.
17. Since the Østre Landsret found that the decision in the case depended on the interpretation of the Directive, it stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Must Article 12(1)(a) of Directive 69/335/EEC of the Council of 17 July 1969 concerning indirect taxes on the raising of capital be construed as authorising duty to be charged on the transfer of shares, irrespective of whether the company which issued those shares is admitted to trade on a Stock Exchange and irrespective of whether the share transfer is effected through the Stock Exchange or directly between the transferor and the acquiring party?'

18. It must first be observed that it is common ground between the parties to the main proceedings that the transaction to which this case relates, to the extent that it comprises an increase in Codan's share capital by the acquisition of the shares in Fjerde SØ, falls within the scope of the Directive.
19. On that basis, Codan maintains that the transaction cannot be taxable twice since the derogation in Article 12(1)(a) of the Directive authorises the charging of duty on share transfers only in respect of stock exchange transactions.
20. On the other hand, the Ministry of Taxation, the French, Austrian and Finnish Governments and the Commission argue that the provision at issue in the main proceedings cannot be interpreted as being limited to stock exchange transactions.
21. In that connection, it must be observed that Article 12(1) of the Directive lays down an exhaustive list of taxes and duties other than capital duty which, in derogation from Articles 10 and 11, may be imposed on capital companies in connection with the transactions referred to in those latter provisions (Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 18).
22. It must further be observed that the derogation provided for in Article 12(1)(a) of the Directive refers, in the Danish version, to 'stock exchange turnover taxes charged at a fixed or variable rate'.
23. However, although the German version uses the equivalent of the expression 'stock exchange turnover taxes', most of the other language versions of the Directive, namely the Greek, Spanish, French, Italian, Dutch, Portuguese and English versions, have the expression 'taxes on the transfer of securities'.
24. Codan argues that the Danish version of the Directive is worded in such specific terms that it creates rights for individuals and companies. Natural persons resident in Denmark must therefore be able to rely on the Danish version of the Directive. Furthermore, the proper functioning of the common market requires that a derogating provision authorising the Member States to impose a particular tax, as does Article 12 of the Directive, should be narrowly construed in the event of doubt. Finally, the discrepancies between the different language versions preclude a common interpretation of Article 12(1)(a) of the Directive.
25. To begin with, it must be borne in mind that, according to the case-law of the Court, the interpretation of a provision of Community law involves a comparison of the different language versions thereof (see Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 18).

26. It must also be pointed out that the need for a uniform interpretation of the language versions requires, in the case of divergence between them, that the provision in question be interpreted by reference to the purpose and general scheme of the rules of which it forms part (Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28, and Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 28).
27. Finally, so far as the purpose of the Directive is concerned, it is intended, as the recitals in its preamble indicate, to encourage the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market. As far as concerns taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in place of them a duty charged only once in the common market and at the same level in all the Member States (Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827, paragraph 16, and *Fantask and Others*, cited above, paragraph 13).
28. It thus follows both from a general principle of interpretation of Community law and from the purpose of the Directive that the provisions thereof must be uniformly interpreted.
29. To disregard the clear wording of the great majority of the language versions of Article 12(1)(a) of the Directive, and so distinguish between those companies which are listed on the Stock Exchange and those which are not, would not only run counter to the requirement that the Directive be interpreted uniformly but could result in competition being distorted and dissuade certain companies from becoming listed on the Stock Exchange.
30. Article 12(1)(a) of the Directive cannot therefore be interpreted as limiting the possibility for Member States to impose taxes to stock exchange transactions only.
31. Having regard to the foregoing considerations, the answer to the question referred to the Court must be that Article 12(1)(a) of the Directive must be interpreted as allowing a tax to be charged in the event of a transfer of shares irrespective, first, of whether the company issuing the shares is listed on a Stock Exchange and, secondly, of whether the shares are transferred on the Stock Exchange or directly from the transferor to the transferee.

Costs

32. The costs incurred by the French, Austrian and Finnish Governments and by the Commission, 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 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 Østre Landsret by order of 24 June 1997, hereby rules:

Article 12(1)(a) of Directive 69/335/EEC of the Council of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as allowing a tax to be charged in the event of a transfer of shares irrespective, first, of whether the company issuing the shares is listed on a Stock Exchange and, secondly, of whether the shares are transferred on the Stock Exchange or directly from the transferor to the transferee.