

JUDGMENT OF THE COURT (Second Chamber)

16 May 2002

(Raising of capital - Directive 69/335/EEC - Scope of application - Limited partnership - Assignment of limited partner's share to a company with limited liability - Levy, after the assignment and the entry into force of the directive, of duty directly proportional to the amount of the contribution)

In **Case C-508/99**,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

**Palais am Stadtpark Hotelbetriebsgesellschaft mbH & Co. KG**

and

**Finanzlandesdirektion für Wien, Niederösterreich und Burgenland,**

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 the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

THE COURT (Second Chamber),

composed of: N. Colneric, President of the Chamber, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2002,

gives the following

## Judgment

1. By order of 16 December 1999, received at the Court on 24 December 1999, the Verwaltungsgerichtshof (Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question 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. 405), as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1).
2. The question was raised in the course of a dispute between Palais am Stadtpark Hotelbetriebsgesellschaft mbH & Co. KG (hereinafter 'Palais') and the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Revenue Administration) concerning the levy of capital duty upon the conversion of Palais into a capital company within the meaning of Directive 69/335 on account of the entry as general partner of a company with limited liability.

### The relevant legislation

#### *The Community legislation*

3. As is apparent from the first recital in its preamble, the aim of Directive 69/335 is to promote the free movement of capital, which is considered to be one of the essential conditions for achieving an economic union whose characteristics are similar to those of a domestic market.
4. According to the sixth recital in the preamble to Directive 69/335 the pursuit of such an objective presupposes, as regards duty on the raising of capital, the abolition of the indirect taxes then in force in the Member States and the application instead of a single tax charged only once in the common market at a level which is the same in all the Member States.
5. Article 1 of Directive 69/335 provides that this tax, called a 'capital duty', is to be charged on 'contributions of capital to capital companies'.
6. Pursuant to Article 3(1)(a) of Directive 69/335, 'capital company' within the meaning of the directive means the companies under Austrian law known as 'Aktiengesellschaft' (public limited company) and 'Gesellschaft mit beschränkter Haftung' (private limited company).
7. Article 3(2) of Directive 69/335 provides as follows:

'For the purposes of the application of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

8. The purpose of that provision is to prevent the choice of a particular legal form resulting in the different fiscal treatment of activities which, from the economic point of view, are the same. For the levy of capital duty, it thus applies to the raising of capital which, whilst having the same economic function as that of capital companies in the strict sense, that is to say, the acquisition of an advantage through the pooling of capital in a separate set of assets, does not satisfy the criteria to be a capital company as defined in Article 3(1). However, Article 3(2) of Directive 69/335 gives the Member States a power to restrict the scope of the identical treatment provided for in the directive, in that it allows them to exclude the raising of certain capital from the capital duty levy.
9. The transactions which are, or may, be subject to levy by the Member States of the harmonised capital duty are laid down objectively and uniformly for all the Member States in Article 4 of Directive 69/335, without reference to particular features of specific national duties or the organisation of national tax systems.
10. According to Article 4 of Directive 69/335:
  - '(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;...
  - (3) Formation, within the meaning of paragraph 1(a), shall not include any alteration of the constituent instrument or regulations of a capital company, and in particular:
    - (a) the conversion of a capital company into a different type of capital company;...'
11. Articles 8 and 9 of Directive 69/335 set out certain transactions which may, subject to the provisions of Article 7, be exempted by the Member States.
12. Article 6 of Directive 69/335 provides as follows:
  - '(1) Each Member States may exclude from the basis of assessment, as determined in accordance with Article 5, the amount of the capital contributed by a member with unlimited liability for the obligations of a capital company as well as the share of such a member in the company's assets.
  - (2) Where a Member State exercises the power provided for in paragraph 1, the following shall be subject to capital duty:
    - ...
    - any transaction as a result of which the liability of a member is limited to his share in the company's capital, in particular when the limitation of liability

results from the conversion of a capital company into a different type of capital company.

Capital duty shall be charged ... on the value of the share in the company's assets belonging to members with unlimited liability for the company's obligations.'

13. In accordance with the last recital in its preamble, Directive 69/335 also provides for the abolition of other indirect taxes with the same characteristics as capital duty. The taxes which may not be levied are set out in particular in Article 10 of the directive, which provides as follows:

'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;

...

- (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.'

*The national legislation*

14. As is apparent from the order for reference, until 31 December 1994 the following were deemed to be capital companies under Austrian legislation: Aktiengesellschaften, Kommanditgesellschaften auf Aktien (limited partnerships with shares), Gesellschaften mit beschränkter Haftung, and associations operating for profit where their members are liable for the debts of the association only in the amount of their individual shares and have the right to transfer their shares to third parties.
15. Since 1 January 1995, Paragraph 4 of the Kapitalverkehrsteuergesetz (Law on capital transfer tax) of 16 October 1934 (DRGBl. p. 1058, in its amended version as published in BGBl. 629/1994, hereinafter 'the KVG') defines capital companies as 'Aktiengesellschaften' and 'Gesellschaften mit beschränkter Haftung'. It also provides that the following are deemed to be capital companies: Kommanditgesellschaften (limited partnerships, hereinafter 'KGs') in which one of the partners with personal liability is a capital company and Kommandit-Erwerbsgesellschaften (small limited partnerships, hereinafter 'KEGs') in which one of the partners with personal liability is a capital company.
16. Under Paragraph 2(1), point 1, of the KVG, 'the acquisition of rights in a domestic capital company by the first acquirer' is subject to capital duty.
17. Paragraph 33, item 16(1), point 1(b), of the Gebührengesetz (Law on fees, BGBl. 267/1957, hereinafter 'the GebG') provided that the duty to be levied on constituent instruments, other than those which relate to capital companies within the meaning of the Kapitalverkehrsteuergesetz in the version applicable until 31 December 1994, by which two or more persons agree to combine in order to operate for profit, was, in the case of a contribution of assets, to be 2% of the value of the capital contribution or

increase in it but not less than ATS 800. That provision was repealed with effect from 1 January 1995.

18. The Republic of Austria also made use of the possibility open to it under Article 6(1) of Directive 69/335 and, as is evident from Paragraph 5(1), point 1, of the KVG, excluded from the taxable amount determined in accordance with Article 5 of the directive the amount of the contribution by a partner with personal liability for the obligations of a capital company.

### **The main proceedings and the national court's question**

19. Palais is an Austrian firm which was established in 1982 as a KG, which under Austrian law was not considered to be a capital company. The duty provided for under Paragraph 33, item 16(1), point 1(b), of the GebG then in force was levied on its constituent instrument. In March 1994 Palais was converted into a KEG.
20. On 17 May 1996 the personally liable partners in Palais assigned their shares to a company with limited liability, which became, as result of that assignment, the sole partner in Palais with full personal liability.
21. The tax authority took the view that, under Paragraph 4(2) of the KVG, Palais had thenceforth to be regarded as a capital company for the purposes of the KVG and sent a notice of provisional tax assessment to it under Paragraph 2(1), point 1, of the KVG, claiming payment of capital duty on the value of the limited partner's capital contribution.
22. On 26 August 1996 Palais appealed against that assessment. It claimed inter alia that, since the contribution in question had already been taxed under Paragraph 33, item 16(1), point 1(b) of the GebG, the duty levied amounted to 'double taxation' of that contribution and, as such, was contrary to the principles laid down in Directive 69/335.
23. The tax authority rejected the appeal as unfounded. Palais then appealed to the second-instance tax authority, which also dismissed the appeal on the ground, in particular, that capital duty had been charged only once on the capital of Palais: the duty levied under Paragraph 33, item 16(1), point 1(b), of the GebG could not be deemed to be capital duty and was in any event levied before the entry into force of Directive 69/335 in the Republic of Austria.
24. The matter was then brought before the Verwaltungsgerichtshof which decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are the provisions 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), and in particular Article 6, to be interpreted as precluding a Member State from levying capital duty on the limited partners' contributions to a limited trading partnership (KG) when a private limited company joins it as general partner, if the partnership capital on which duty is to be imposed has already been subject, before the entry into force of Directive 69/335/EEC, to duty such as that referred to in Paragraph 33, item 16(1)(b) of the *Gebührengesetz 1957* (BGBl. 267/1957)?'

### **The national court's question**

25. By its question the national court is asking in essence whether Directive 69/335 precludes the levying of capital duty upon the conversion of a partnership into a capital company within the meaning of that directive, where, before the entry into force of that directive, a duty such as that provided for in Paragraph 33, item 16(1), point 1(b), of the GebG has already been levied on all the capital contributions made for the acquisition of shares in the partnership.
26. When Article 1 is read in conjunction with Article 3(1) and (2) of Directive 69/335, it is apparent that the directive is intended to apply only to capital companies, as defined in that directive, and to the companies, firms, associations or legal persons operating for profit deemed to be capital companies and regarded as such by a Member State for the purpose of charging capital duty.
27. Accordingly, duties and charges levied by the Member States on contributions to companies and firms other than those referred to in Directive 69/335 do not fall within the scope of application of that directive.
28. It follows that the prohibition in Article 10 of Directive 69/335 on the charging of any tax with the same characteristics as capital duty cannot apply to a duty or charge which, whatever its characteristics, is levied on contributions to companies or firms which are not capital companies within the meaning of the directive. That prohibition does not therefore preclude the levy of capital duty upon the conversion of such a company or firm into a capital company, even where the contributions to it before its conversion have already been subject to a levy or tax with the same characteristics as capital duty.
29. That interpretation is confirmed, as the Advocate General has observed in point 30 of his Opinion, by Article 4 of Directive 69/335, which provides that the conversion into a capital company of a company, firm, association or legal person which is not a capital company is subject to capital duty, whereas the conversion of a capital company into a different type of capital company is not subject to capital duty.
30. As regards the provisions of Article 6 of Directive 69/335 and the prohibition of double taxation which, in the national court's opinion, follows therefrom by virtue of Case C-280/91 *Viessmann* [1993] ECR I-971, it should be observed, first, that Article 6 relates only to capital duty on contributions to capital companies within the meaning of Directive 69/335. Next, in *Viessmann* the Court did not hold that Article 6 of the directive precludes the taxation of certain contributions on more than one occasion but merely held that contributions which had already given rise to payment of capital duty under another provision of the directive could not be subject to capital duty under Article 6 of the directive. Finally, the company in question in the proceedings giving rise to that judgment was, at the time when it first had to pay capital duty, a capital company within the meaning of Directive 69/335.
31. Consequently, Article 6 of Directive 69/325 does not preclude the levy of capital duty in a situation such as that at issue in the main proceedings.
32. In those circumstances, it is unnecessary to ascertain whether or not the duty levied under Paragraph 33, item 16(1), point 1(b), of the GebG has the same characteristics as

capital duty with the meaning of Article 10 of Directive 69/335 and the answer to the national court's question must be that the provisions of Directive 69/335 must be interpreted as not precluding the levy of capital duty upon the conversion of a partnership into a capital company within the meaning of that directive, where, before the entry into force of that directive, a duty such as that provided for in Paragraph 33, item 16(1), point 1(b), of the GebG has already been levied on all the capital contributions made for the acquisition of shares in the partnership.

### Costs

33. The costs incurred by the Austrian Government 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 (Second Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 16 December 1999, hereby rules:

**The provisions of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by the Act concerning the conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded must be interpreted as not precluding the levy of capital duty upon the conversion of a partnership into a capital company within the meaning of that directive, where, before the entry into force of that directive, a duty such as that provided for in Paragraph 33, item 16(1), point 1(b), of the Gebührengesetz has already been levied on all the capital contributions made for the acquisition of shares in the partnership.**