

JUDGMENT OF THE COURT (Sixth Chamber)
11 November 1999

In Case C-350/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Diikitiko Protodikio, Piraeus, Greece, for a preliminary ruling in the proceedings pending before that court between

Henkel Hellas ABEE

and

Greek State

on the interpretation of Articles 4 and 7 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 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23),

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting as President of the Sixth Chamber, G. Hirsch and H. Ragnemalm (Rapporteur), Judges,

Advocate General: N. Fennelly,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Henkel Hellas ABEE, by D. Papadellis, of the Athens Bar,
- the Greek Government, by K. Paraskevopoulou-Grigoriou, Agent for Legal Proceedings in the State Legal Service, and D. Tsagkaraki, Adviser in the Special Legal Service — Section for European Community Law in the Ministry of Foreign Affairs, acting as Agents,
- the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Greek Government, represented by M. Apessos, Deputy Legal Adviser in the State Legal Service, acting as Agent, and the Commission, represented by D. Gouloussis, at the hearing on 22 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 9 September 1999,

gives the following

Judgment

- 1 By order of 29 May 1998, received at the Court on 24 September 1998, the Diikitiko Protodikio (Administrative Court of First Instance), Piraeus, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 4 and 7 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 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) (hereinafter 'Directive 69/335').

- 2 Those questions were raised in proceedings between the company Henkel Hellas ABEE ('Henkel Hellas') and the Greek State concerning the payment of duty on the capitalisation of undistributed profits.

Community legislation

- 3 Directive 69/335 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-236/97 *Skatteministeriet v Codan* [1998] ECR I-8679, paragraph 3).
- 4 Article 4(1) of Directive 69/335 sets out the transactions which give rise to the levying of capital duty. The first subparagraph of Article 4(2) lists the transactions which the Member States may continue to subject to that duty to the extent that they were taxed at the rate of 1% as at 1 July 1984. According to the second subparagraph of Article 4(2), however, the Hellenic Republic is to determine which of the transactions listed it will subject to capital duty.
- 5 Item (a) of the first subparagraph of Article 4(2) specifically covers the 'increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves'.
- 6 As regards the rate of duty, Article 7 provides:

' 1 . Member States shall exempt from capital duty transactions ... which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less.

The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0.50% or less.

The Hellenic Republic shall determine which transactions it shall exempt from capital duty.

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.
 3. ...'
- 7 Article 10(a) 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 in respect of the transactions referred to in Article 4.

National legislation

- 8 Directive 69/335 was transposed into national law by Law 1676/1986 (FEK (Official Gazette) I 204/29.12.1986) which, in Article 21, fixed capital duty at 1% of the taxable value. Under Article 22(2)(b) of that Law, however, increases in capital by the capitalisation of profits or of permanent or temporary reserves are exempted from capital duty.
- 9 Article 42(6) of Law 2065/1992, which is applicable in the main proceedings, nevertheless provides:

'Undistributed profits which have been taxed in the name of the legal person shall, if distributed in any form whatsoever or capitalised after the draft of this Law was deposited with Parliament for enactment, be subject to tax at a rate of 3%, without repayment or offsetting of the income tax paid at the time when those profits were realised.'

Main proceedings

- 10 By resolution of a general meeting of its shareholders on 31 August 1995, Henkel Hellas capitalised undistributed profits of GRD 215 066 276 already taxed in its name, corresponding to the financial years 1972, 1973 and 1981 to 1989.
- 11 Henkel Hellas submitted to the tax authority declarations for payment of the duty of 3% laid down by Article 42(6) of Law 2065/1992. In those declarations it set out a qualification concerning the application of that duty to capitalised profit, in accordance with the provisions of Greek law.
- 12 In the action brought by it before the Diikitiko Protodikio, Piraeus, for the annulment of the implied rejection of those qualifications, Henkel Hellas submits that the duty of 3 % on the increase in capital resulting from the capitalisation of profits is directly contrary to Directive 69/335.
- 13 Since the Diikitiko Protodikio, Piraeus, was unsure whether that duty was consistent with Directive 69/335, it decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - (1) Is the duty charged by the Greek State pursuant to Article 42(6) of Law 2065/1992 equivalent to the capital duty laid down by Article 4 of Council Directive 69/335/EEC of 17 July 1969, as subsequently amended, taking into account that on 1 July 1984 no such capital duty existed in Greece?
 - (2) If so, taking account of Greece's special fiscal situation, may the rate of that duty exceed the rate of 1% in the abovementioned directive?

Question 1

- 14 By its first question, the national court essentially asks whether Directive 69/335 prevents a tax from being levied on the capitalisation by a capital company of undistributed profits, such as the tax at issue in the main proceedings.
- 15 The Greek Government points out that Law 1676/1986, which governs taxation on the raising of capital in Greece, makes no provision for capital duty to be imposed on any transaction corresponding to an increase in capital by capitalisation of profits or of permanent or temporary reserves, referred to in item (a) of the first subparagraph of Article 4(2) of Directive 69/335. On the contrary, Article 22(2)(b) of that Law expressly exempts increases in capital by the capitalisation of profits or of permanent or temporary reserves.
- 16 According to the Greek Government, Article 42 of Law 2065/1992 is concerned solely with the direct taxation of income and does not relate to increases in the capital of public limited companies, which remain free of tax. Article 42 is transitional, because of the alteration of the system for levying tax on income constituted by profits of public limited companies, which are taxable as such.
- 17 The Greek Government thus maintains that the duty of 3% at issue in the main proceedings is a direct tax on income. Directive 69/335 seeks to abolish indirect taxes, other than capital duty, with the same characteristics as capital duty. The harmonisation provided for by Directive 69/335 does not extend to direct taxes, such as company income tax, which are a matter for the Member States themselves (Case C-287/94 *Frederiksen v Skatteministeriet* [1996] ECR I-4581, paragraph 21).
- 18 In that regard, it should be noted first of all that, as the Greek Government has confirmed, when Directive 69/335 was transposed into national law the Hellenic Republic made use of the power

reserved to it by the final subparagraph of Article 7(1) of that directive and expressly exempted from capital duty increases in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves.

- 19 Second, in so far as a tax, such as the tax at issue in the main proceedings, is levied on the capitalisation by a capital company of undistributed profits, it relates to one of the transactions which, according to the first subparagraph of Article 4(2) of Directive 69/335, may continue to be subject to capital duty.
- 20 It is settled case-law that the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law (see, in particular, Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 39).
- 21 Also, Article 10(a) of Directive 69/335 provides that, apart from capital duty, the Member States may not charge any taxes whatsoever in respect of the transactions referred to in Article 4, such as increases in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves.
- 22 In those circumstances, it must be concluded that Directive 69/335 prevents a Member State which has exempted from capital duty increases in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves from subjecting the same transactions to another tax, irrespective of its classification under national law.
- 23 The answer to the first question must therefore be that Directive 69/335 is to be interpreted as preventing a tax from being levied on the capitalisation by a capital company of undistributed profits, such as the tax at issue in the main proceedings.

Question 2

- 24 Given the answer to the first question, there is no need to consider the second question.

Costs

- 25 The costs incurred by the Greek Government and 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 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 Diikitiko Protodikio, Piraeus, by order of 29 May 1998, 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, is to be interpreted as preventing a tax from being levied on the capitalisation by a capital company of undistributed profits, such as the tax at issue in the main proceedings.