

JUDGMENT OF THE COURT (Sixth Chamber)

17 October 2002

(Directive 69/335/EEC - Indirect taxes on the raising of capital - Capital duty - Contribution of assets of any kind - Meaning - Payments made by the parent company of a company which has acquired dividend certificates issued by a capital company)

In Case C-71/00,

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

Develop Baudurchführungs- und Stadtentwicklungs GmbH

and

Finanzlandesdirektion für Wien, Niederösterreich und Burgenland,

on the interpretation of Article 4(1)(d) 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 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 (Sixth Chamber),

composed of: J.-P. Puissechet, President of the Chamber, R. Schintgen (Rapporteur), C. Gulmann, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Develop Baudurchführungs- und Stadtentwicklungs GmbH, by P. Kisler and K. Pistotnik, Rechtsanwälte,
- the Austrian Government, by H. Dossi, acting as Agent,
- the Netherlands Government, by M.A. Fierstra, 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 7 February 2002,

gives the following

Judgment

1. By order of 17 February 2000, received at the Court on 2 March 2000, the Verwaltungsgerichtshof (Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 4(1)(d) 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 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. That question was raised in the course of proceedings between Develop Baudurchführungs- und Stadtentwicklungs GmbH (hereinafter 'Develop') and the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Revenue administration for the *Länder* of Vienna, Lower Austria and Burgenland, hereinafter 'the Finanzlandesdirektion') concerning the levy of capital duty on payments made to Develop upon the issue of dividend certificates.

Relevant provisions

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. Under Article 4(1) of Directive 69/335:
'The following transactions shall be subject to capital duty:
...
(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;
...'.
...
6. Article 5(1) of Directive 69/335 is worded as follows:
'1. The duty shall be charged:
(a) in the case of formation of a capital company or of an increase in its capital or assets, as referred to in Article 4(1)(a), (c) and (d): on the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution. Member States may postpone the charging of capital duty until the contributions have been effected;
...
(d) in the case of an increase in the assets, as referred to in Article 4(2)(b): on the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services;
...'.
...

Austrian legislation

7. Under Paragraph 2(1), point 1, of the Kapitalverkehrsteuergesetz (Law on capital transfer tax) of 16 October 1934 (DRGBL. 1934/1058, in its amended version as published in BGBl. 1995/21, hereinafter 'the KVG'), 'the acquisition by the first acquirer of rights in a domestic capital company' is subject to capital duty.
8. Under Paragraph 5, point 1, of the KVG, dividend rights are deemed to be rights in a company. Under point 2 of that provision, owners of dividend rights are treated as members of the capital company which issued those rights.
9. Under Paragraph 7(1)(a) of the KVG the basis of assessment on the acquisition of rights in a company, and therefore also on the acquisition of dividend certificates, is made up of the value of the consideration, which also includes the costs of the company formation or increase in capital which are assumed by the members, but not the capital duty to be paid in respect of the acquisition of the rights in the company.

The main proceedings and the question referred

10. Develop is a limited liability company whose members are Kontrakto Bauerrichtungs- und Wertungsgesellschaft mbH and Raiffeisenlandesbank Niederösterreich - Wien reg. Genossenschaft mbH.
11. In December 1995, RLB Beteiligungs- und Treuhandverwaltungs GmbH (hereinafter 'RLB-BT') subscribed for dividend certificates issued by Develop with a total nominal value of ATS 1,615,000.
12. As is apparent from the order for reference, those dividend certificates represented an entitlement to a share in Develop's current profits, in its assets, in the value of its business, including all its secret reserves and goodwill, as well as in any surplus upon the liquidation of that company.
13. It is also apparent from the order for reference that those dividend certificates also entitled their holder to repayment of the nominal value plus any additional payments made. In the event of termination of the dividend rights by notice, certificate holders were entitled to receive a sum equal to their share in Develop's value at the time of termination, which sum was not to be less than the nominal value of their dividend certificates plus any additional payments made. In the event of liquidation of that company, dividend certificate holders were to be entitled to a share in any surplus upon liquidation corresponding to the value of their certificates. Acquisition of those dividend certificates was not, moreover, to create any shareholder relationship whatsoever between the company issuing the certificates and their acquirers. Furthermore, the holders were not to enjoy certain member's rights such as the right to vote or the right to participate in general meetings.
14. On 16 February 1996, the declaration relating to the issue of the dividend certificates was lodged with the Finanzamt für Gebühren und Verkehrsteuern (tax office for fees and transaction tax, hereinafter 'the Finanzamt'). It was apparent from that declaration that, apart from the sum of ATS 1,615,000 paid by RLB-BT, Develop had received an additional payment of ATS 321 385 000 from RLB Immobilienprojektentwicklungs- und Beteiligungs GmbH (hereinafter 'RLB-IB'). Develop, which admitted that that additional payment had been made in connection with the issue of the dividend certificates, none the less claimed that that payment was not subject to capital duty because it did not come from the acquirer of the certificates, but from the acquirer's parent company.

15. By decision of 29 May 1996, the Finanzamt assessed the capital duty payable by Develop using the amount of ATS 323,000,000 as the basis of assessment.
16. Develop appealed against that decision to the Finanzlandesdirektion, claiming that an additional payment, such as the 'parent company contribution' ('Großmutterzuschuss') paid by RLB-IB, which is made by a non-member, is not subject to capital duty. However, in that appeal, Develop did not challenge the levy of capital duty on the sum of ATS 1'615'000.
17. By decision of 18 July 1997, the Finanzlandesdirektion dismissed that appeal on the ground that the source of the contributions received in connection with the issue of the dividend certificates is irrelevant, since the sums paid in respect of the nominal value of the dividend certificates and the additional payment form a whole. Those two sums are to be regarded as one since they determine both the amount of the entitlement to repayment and the amount of the entitlement to profits which the certificate holder may claim.
18. Develop challenged that decision before the Verwaltungsgerichtshof. In support of its action, it argued in particular that, under Article 4 of Directive 69/335, additional payments which do not originate from a member of the capital company which receives them cannot be subject to capital duty.
19. In those circumstances, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:
'Do payments which an acquirer of dividend rights in a capital company does not make itself but makes through its parent company constitute a "contribution of assets of any kind" within the meaning of Article 4(1)(d) of Directive 69/335 ...?'

The question referred

20. By its question the referring court is asking, in essence, whether Article 4(1)(d) of Directive 69/335 is to be interpreted as meaning that capital duty is chargeable on payments made by a parent company to a capital company, which is increasing its assets by the issue of dividend certificates, in order to enable the acquisition of such certificates by a subsidiary of that parent company.
21. In that regard, it is appropriate first of all to point out that, as is clear from paragraph 28 of today's judgment in Case C-138/00 *Solida and Tech* [2002] ECR I-8905, the issue by a capital company of dividend certificates such as those in issue in the main proceedings comes, as a rule, within the scope of Article 4(1)(d) of Directive 69/335.
22. It should then also be noted that the Court has held that the fact that the acquirer of those dividend certificates is not a member of the company which issued them is not such as to exclude that transaction from the scope of Directive 69/335 (see, to that effect, *Solida and Tech*, cited above, paragraphs 32 and 33).
23. It follows that all the contributions made by an acquirer of dividend certificates in order to finance that acquisition are subject to capital duty pursuant to Article 4(1)(d) of Directive 69/335.
24. Additional payments exceeding the nominal value of the dividend certificates, which the acquirer thereof makes to the issuing company, must be regarded as contributions made to finance the acquisition of those certificates, where such payment is an essential condition of that acquisition (see, by analogy, today's judgment in Case C-339/99 *ESTAG* [2002] ECR I-8837, paragraphs 30 to 33).

25. Finally, it should also be observed that it follows from paragraphs 37 and 38 of the judgment in *ESTAG*, cited above, that, where it is a matter of deciding whether a transaction falls within the scope of Article 4 of Directive 69/335, it is necessary to adopt an economic approach, and not a formal one based solely on the source of the contributions, by asking which person must be deemed in fact to have paid the contributions.
26. Therefore, where it is a matter of deciding whether additional payments made by the parent company of an acquirer of dividend certificates come within the scope of Article 4(1)(d) of Directive 69/335, it is appropriate to establish to what extent such payments must be deemed to have been made by that acquirer.
27. In that regard, the fact that the obligation to make such payments is imposed on the subsidiary and the fact that such payment has discharged the subsidiary's liability are indications which establish that those payments by the parent company of a subsidiary must be deemed to have been made by the subsidiary (see, to that effect, *ESTAG*, cited above, paragraph 39).
28. It is, however, for the national court to decide, having regard to the facts of the case before it, whether an additional payment by an acquirer of dividend certificates is made to finance that acquisition - or whether there is a necessary link with it - and, where such payment is made by the parent company of the certificates' acquirer, whether it must be deemed to have been made by the latter.
29. Having regard to the preceding considerations, the answer to the question referred must be that Article 4(1)(d) of Directive 69/335 is to be interpreted as meaning that capital duty is chargeable on payments made by a parent company to a capital company, which is increasing its assets by the issue of dividend certificates, in order to enable the acquisition of such certificates by a subsidiary of that parent company.

Costs

30. The costs incurred by the Austrian and Netherlands 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 Verwaltungsgerichtshof by order of 17 February 2000, hereby rules:

Article 4(1)(d) 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 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, is to be interpreted as meaning that capital duty is chargeable on payments made by a parent company to a capital company, which is increasing its assets by the issue of dividend certificates, in order to enable the acquisition of such certificates by a subsidiary of that parent company.