JUDGMENT OF THE COURT (Second Chamber)

12 June 2014

(Request for a preliminary ruling — Concept of 'court or tribunal of a Member State' — Tribunal Arbitral Tributário — Directive 69/335/EEC –Articles 4 and 7 — Increase of the share capital of a capital company — Stamp duty in force on 1 July 1984 — That stamp duty subsequently abolished, and then re-introduced)

In **Case C-377/13**,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Portugal), made by decision of 31 May 2013, received at the Court on 3 July 2013, in the proceedings

Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA, by F. Fernandes Lourenço, advogado,

– the Portuguese Government, by L. Inez Fernandes, J. Menezes Leitão and A. Cunha, acting as Agents,

– the European Commission, by P. Guerra e Andrade and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 April 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4, 7 and 10(a) 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).

2 The request was made in proceedings between Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA ('Ascendi') and the Autoridade Tributária e Aduaneira (Portuguese Tax and Customs Authority), concerning its decision, of 6 August 2012, refusing to refund Ascendi the stamp duty it had paid in respect of four capital increases it carried out between December 2004 and November 2006 ('the contested decision').

Legal context

EU law

3 According to the first recital of its preamble, Directive 69/335 sought to promote the free movement of capital, which is considered to be a fundamental freedom essential to the creation of an internal market. To that end, as is apparent from the sixth, seventh and eighth recitals, that directive aimed to harmonise duty on capital contributions to companies within the European Union by introducing a single duty on the raising of capital that could be charged only once within the internal market and by abolishing all other indirect taxes with the same characteristics as that single capital duty.

4 To that effect, Article 1 of Directive 69/335 provided that 'Member States shall charge on contributions of capital to capital companies a duty harmonised in accordance with the provisions of Articles 2 to 9 and hereinafter called capital duty'.

5 Directive 85/303 made certain substantive changes to Directive 69/335, in particular to Articles 4(2) and 7 of that directive. The second to fourth recitals to Directive 85/303 set out:

'… the economic effects of capital duty are detrimental to the regrouping and development of undertakings; … such effects are particularly harmful in the present economic situation in which there is a paramount need for priority to be given to stimulating investment;

… there should be mandatory exemption for the transactions currently subject to the reduced rate of capital duty;

… the best solution for attaining these objectives would be to abolish capital duty; … however, the losses of revenue which would result from such a measure are unacceptable for certain Member States; … the Member States must therefore be given the opportunity to exempt from or subject to capital duty all or part of the transactions coming within its scope …;

… there should be mandatory exemption for the transactions currently subject to the reduced rate of capital duty'.

6 Article 4 of Directive 69/335, in the version resulting from Directive 85/303 ('Directive 69/335'), provided:

'1. 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;

…

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;

…'

7 According to Article 7 of Directive 69/335:

'1. Member States shall exempt from capital duty transactions, other than those referred to in Article 9, 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.

…

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%.

…'

8 Article 10(a) of Directive 69/335 provided:

'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;

…'

9 The time-limit for transposition of Directive 85/303 had been set at 1 January 1986.

10 Directive 69/335 was repealed by Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11). However, that repeal took place after the events giving rise to the dispute in the main proceedings.

National law

11 Article 145 of the Schedule of Stamp Duties (Tabela Geral do Imposto de Selo; 'TGIS'), approved by Decree-Law No 21196 of 28 November 1932, in the version in force on 1 July 1984, provided:

'Strengthening or increase of companies' capital, on the amount of the increase:

(a) civil law partnerships — 5‰ (stamp duty);

(b) capital companies … — 2% (stamp duty);

(c) other companies — 7‰ (stamp duty).

1. As regards those undertakings referred to in paragraphs (a) and (c), the stamp duty under Article 93 shall be added.

2. Where the strengthening or increase of capital is in cash, it is exempt from the duty.'

12 Subsequently, Decree-Law No 223/91 of 18 June 1991, amending Article 145(2)(a) TGIS, exempted from the duty 'the strengthening or increase of the capital of capital companies', thus exempting from stamp duty any increases in the capital of capital companies, regardless of how that increase is achieved.

13 Pursuant to Decree-Law No 322-B/2001 of 14 December 2001, by the addition of Article 26.3 to the TGIS, all increases in the capital of capital companies, regardless of how those increases were achieved, were made subject to stamp duty at the rate of 0.40% on the amount of the increase.

The dispute in the main proceedings and the question referred for a preliminary ruling

14 Between 15 December 2004 and 29 November 2006, Ascendi, a capital company, increased its share capital four times through the conversion into capital of the claims of shareholders owing to their provision, before those share capital increases, of ancillary services to that company. In respect of those share capital increases, Ascendi paid a total amount of EUR 205 381.95 in stamp duty and also registration and notary charges.

15 On 28 March 2008, Ascendi claimed from the Autoridade Tributária e Aduaneira refund of the sums paid in stamp duty at the time of the share capital increases. That claim was refused by the contested decision.

16 Ascendi brought the matter before the Tribunal Arbitral Tributário (arbitration tribunal dealing with taxation).

17 In the order for reference, the Tribunal Arbitral Tributário considers, first of all, that it meets the conditions provided for under Article 267 TFEU, for the purpose of being considered a court or tribunal of a Member State within the meaning of that article.

18 Next, the Tribunal Arbitral Tributário questions whether Decree-Law No 322-B/2001, on which the contested decision is based, is compatible with Articles 4, 7 and 10(a) of Directive 69/335. To that effect, it refers first to Ascendi's argument, which notes that, in Portugal, share capital increases have been exempt from stamp duty since 1991, pursuant to Decree-Law No 223/91, and that in the specific case of share capital increases carried out in cash, the exemption went back as far as May 1984. The reintroduction, in 2001, by Decree-Law No 322-B/2001, of a stamp duty infringes, in Ascendi's view, the provisions of the directive.

19 The Tribunal Arbitral Tributário notes that that argument is disputed by the Autoridade Tributária e Aduaneira. According to that authority, with regard to share capital increases, Article 7(1) of Directive 69/335 requires the Member States to exempt from capital duty only those transactions that, as at 1 July 1984, were exempt or subject to a tax rate equal to or lower than 0.50%. That provision did not relate to the share capital increases at issue in the main proceedings, carried out other than by cash contribution. In fact, as at 1 July 1984, national law provided, in respect of such transactions, for the levying of a stamp duty at a rate higher than 0.50%.

20 The Tribunal Arbitral Tributário considers, lastly, that an answer cannot be clearly deduced from the case-law of the Court. In the case giving rise to the judgment in Case C-366/05 *Optimus — Telecomunicações* EU:C:2007:366, the share capital increase had been carried out by means of contributions in cash. Indeed, that increase, contrary to those at issue in the main proceedings, was exempt from stamp duty on 1 July 1984.

21 In those circumstances, the Tribunal Arbitral Tributário decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Article 4(1)(c) and (2)(a), Article 7(1) and Article 10(a) of [Directive 69/335] preclude national legislation, such as Decree-Law No 322-B/2001 of 14 December 2001, which subjected to stamp duty any increases in the capital of capital companies through the conversion into capital of the claims of shareholders in respect of ancillary services provided previously to the company, even if those ancillary services had been provided in cash, bearing in mind that, as at 1 July 1984, national legislation subjected those increases in capital, made in that way, to stamp duty at the rate of 2%, and that, at the same date, it exempted from stamp duty capital increases made in cash?'

The jurisdiction of the Court

22 As a preliminary matter, it is necessary to examine whether the Tribunal Arbitral Tributário is to be considered a court or tribunal of a Member State for the purposes of Article 267 TFEU.

23 In that regard, it must be recalled that, according to settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether

it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see Case C-394/11 *Belov* EU:C:2013:48, paragraph 38 and the case-law cited). In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, Case C-53/03 *Syfait and Others* EU:C:2005:333, paragraph 29, and *Belov* EU:C:2013:48, paragraph 39).

24 In the main proceedings, it appears from the information provided in the order for reference that the arbitration tribunals dealing with taxation have been established by law. The arbitration tribunals are included in the list of national courts in Article 209 of the Constitution of the Portuguese Republic. Moreover, Article 1 of Decree-Law No 10/2011, of 20 January 2011, on the legal rules governing tax arbitration, provides that tax arbitration constitutes an alternative means of judicial resolution of tax disputes and Article 2 of the same decree-law confers general jurisdiction on arbitration tribunals dealing with taxation for assessing the legality of the payment of any tax.

25 In addition, as an element of the system of judicial resolution of tax disputes, arbitration tribunals dealing with taxation meet the requirement of permanence.

26 As stated by the Advocate General in paragraph 37 of his Opinion, even though the composition of the trial formations of the Tribunal Arbitral Tributário is ephemeral and their activity ends once they have made their ruling, the fact remains that, as a whole, the Tribunal Arbitral Tributário, as an element of the system referred to, is permanent in nature.

27 With regard to compulsory jurisdiction, it must be recalled that this element is lacking in contractual arbitration, since the contracting parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are neither involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case C-125/04 *Denuit and Cordenier* EU:C:2005:69, paragraph 13 and the case-law cited, and order in C-555/13 *Merck Canada* EU:C:2014:92, paragraph 17).

28 However, the Court has held admissible preliminary questions referred to it by an arbitration tribunal, where that tribunal had been established by law, its decisions were binding on the parties and its jurisdiction did not depend on their agreement (order in *Merck Canada* EU:C:2014:92, paragraph 18 and the case-law cited).

29 As stated by the Advocate General in paragraphs 28 and 40 of his Opinion, the Tribunal Arbitral Tributário, whose decisions are binding on parties under Article 24(1) of Decree-Law No 10/2011, must be distinguished from an arbitration tribunal in the strict sense. Its jurisdiction stems directly from the provisions of Decree-Law No 10/2011 and is not, as a result, subject to the prior expression of the parties' will to submit their dispute to arbitration (see, by analogy, Case 109/88 *Danfoss* EU:C:1989:383, paragraph 7). Thus, where the taxpayer applicant submits its dispute to tax arbitration, the Tribunal Arbitral Tributário has, in accordance with Article 4(1) of Decree-Law No 10/2011, compulsory jurisdiction as regards taxation and customs matters.

30 The requirement of *inter partes* procedure before the arbitration tribunals dealing with taxation, meanwhile, is guaranteed by Articles 16 and 28 of Decree-Law No 10/2011. Moreover, in accordance with Article 2(2) of that decree-law, the arbitration tribunals dealing with taxation 'are to adjudicate on the basis of statutory law and recourse to equity is prohibited'.

31 With regard to the independence of the arbitration tribunals dealing with taxation, it is apparent, first, from the order for reference that the arbitrators comprising the Tribunal Arbitral Tributário before which the dispute in the main proceedings was brought were appointed, pursuant to Article 6 of Decree-Law No 10/2011, by the Conselho Deontológico do Centro de Arbitragem Administrativa (Ethics Board of the Centre for Administrative Arbitration) from among the list drawn up by that institution.

32 Secondly, Article 9 of Decree-Law No 10/2011 provides that arbitrators are to be subject to the principles of impartiality and independence. Moreover, Article 8(1) of that decree-law specifies, as an impediment to the exercise of the function of arbitrator, the existence of any personal or professional relationship between the arbitrator and one of the parties to the dispute. It is thus ensured that the relevant arbitration tribunal acts as a third party in relation to the authority which adopted the impugned decision (see Case C-517/09 *RTL Belgium* EU:C:2010:821, paragraph 38 and the case-law cited, and order in Case C-167/13 *Devillers* EU:C:2013:804, paragraph 15).

33 Lastly, as is apparent from Article 1 of Decree-Law No 10/2011, the arbitration tribunals dealing with taxation give judgment in proceedings that give rise to a decision of a judicial nature.

34 It is clear from all the foregoing considerations that the referring body possesses all the characteristics necessary in order to be regarded as a court or tribunal of a Member State for the purposes of Article 267 TFEU.

35 The Court therefore has jurisdiction to reply to the question referred by the referring court.

The question referred for a preliminary ruling

36 By its question, the referring court is essentially asking whether Articles 4, 7 and 10(a) of Directive 69/335 preclude legislation of a Member State which reintroduces stamp duty on increases of share capital of a capital company, which were subject to such duty on 1 July 1984, but which later were exempted from it.

37 According to Ascendi, transactions such as those at issue in the main proceedings were already exempt from stamp duty on 1 July 1984, pursuant to the applicable national law.

38 In that regard, it must be noted that it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of provisions of national law or on the assessment of the factual context of the main proceedings, which is a task reserved exclusively to the referring court (see, to that effect, Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* EU:C:2009:250, paragraph 48, and Case C-345/09 *van Delft and Others* EU:C:2010:610, paragraph 114).

39 It is clear from the wording of the question referred for a preliminary ruling that, on 1 July 1984, national legislation subjected share capital increases, such as those at issue in the main proceedings, to a stamp duty at the rate of 2%.

40 With regard to whether the provisions of Directive 69/335 preclude national legislation such as that at issue in the main proceedings, it must be recalled, first, that that legislation subjects to stamp duty the share capital increases of a capital company. In so far as it affects the raising of capital as such, that stamp duty constitutes a capital duty, within the meaning of Article 1 of Directive 69/335.

41 In those circumstances, the interpretation of Article 10 of Directive 69/335, which covers only indirect taxes other than capital duty, is irrelevant to the outcome of the dispute in the main proceedings.

42 It must be stated, next, that the transactions at issue in the main proceedings fall under Article 4(1)(c) of Directive 69/335. The various share capital increases of the capital company in question were carried out 'by contribution of assets of any kind', for the purposes of that provision, that is to say, through the conversion into capital of the claims of shareholders owing to the provision, before those share capital increases, of ancillary services to that company.

43 With regard to the transactions referred to in Article 4(1) of Directive 69/335, that provision provides that they 'shall be subject to capital duty'.

44 However, despite the wording of Article 4(1), it is apparent from Article 7 of that directive that there is no obligation to subject to capital duty transactions falling under the former provision.

45 On the contrary, the Court has held that Article 7(1) of Directive 69/335 sets out a clear and unconditional obligation, on the part of Member States, to exempt from capital duty transactions falling within the scope of that directive which, on 1 July 1984, were exempted or taxed at a rate of 0.50% or less (see *Optimus — Telecomunicações* EU:C:2007:366, paragraph 30, and Case C-372/10 *Pak-Holdco* EU:C:2012:86, paragraph 28). That obligation as well as the other obligations flowing from Directive 69/335 has been binding on the Portuguese Republic since 1 January 1986, the date of that State's accession to the European Union.

46 However, in so far as transactions such as those at issue in the main proceedings, falling under Article 4(1) of Directive 69/335 were, on 1 July 1984, subject to capital duty, at a rate higher than 0.50%, the Republic of Portugal could, in accordance with Article 7(2) of that directive, decide to continue to make transactions of that type subject to capital duty at the time of its accession to the Union, on 1 January 1986 (see, to that effect, Case C-212/10 *Logstor ROR Polska* EU:C:2011:404, paragraph 34).

47 Lastly, it remains to be assessed whether a Member State, after waiving, in 1991, the levying of capital duty on transactions falling under Article 4(1) of Directive 69/335, could decide to reintroduce such a duty in 2001.

48 Since Articles 4(1) and 7(1) and (2) of Directive 69/335 do not refer expressly to the case of a tax, abolished and later reintroduced from 1 July 1984, it is necessary to have

recourse to a teleological interpretation of the provisions concerned, by examining the objective pursued by them.

49 It is apparent from the second and third recitals of Directive 85/303 that Directive 69/335 has the objective of limiting or abolishing capital duty. In the light of that objective, it is clear from the third recital that it was only by reason of the budgetary difficulties they would be faced with if capital duty were abolished that Member States which had not waived the levying of that duty could maintain such a duty (see, to that effect, *Logstor ROR Polska* EU:C:2011:401, paragraph 36).

50 The reference to the date of 1 July 1984, made in the first subparagraph of Article 7(1) of Directive 69/335, cannot constitute for Member States which, at that date, made the transactions in question subject to capital duty, at a rate higher than 0.50%, an authorisation to reintroduce such a duty after waiving it, which would go against the wording of that provision and the objective of limiting or abolishing capital duty pursued by that directive. The intention of the Union legislature was in fact to abolish capital duty, the possibility of maintaining it only being an exception motivated by the fear of loss of revenue by Member States. Therefore, even if the loss of budget revenue could justify maintaining capital duty beyond 1 July 1984, within the limits set in Article 7(2) of the directive, it could not justify reintroducing such duty (see, to that effect, *Logstor ROR Polska* EU:C:2011:404, paragraphs 37 to 39).

51 By contrast to what the Portuguese Government maintains, the 'standstill' obligation stemming from Directive 69/335 concerns both the transactions referred to in Article 4(2) of that directive and those mentioned in Article 4(1) of the same directive. In a situation such as that at issue in the main proceedings, that obligation stems from Article 7(1) and (2) of Directive 69/335, interpreted in the light of that directive's objective. As is clear from paragraph 45 of the present judgment, the obligations stemming, for Member States, from Article 7 of Directive 69/335 concern every transaction falling within the scope of that directive and, consequently, every transaction falling within Article 4 of the same directive, regardless of whether it is mentioned in the first or second paragraph of that article.

52 Accordingly, the answer to the question referred is that Articles 4(1)(c) and 7(1) and (2) must be interpreted as precluding the reintroduction by a Member State of capital duty on increases of share capital of a company falling under the first of those provisions, which were subject to such duty on 1 July 1984, but which were later exempted from that duty.

Costs

53 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 4(1)(c) and 7(1) and (2) of 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, must be interpreted as precluding the reintroduction by a Member State of capital duty on increases of share capital of a company falling under the first of those provisions, which were subject to such duty on 1 July 1984, but which were later exempted from that duty.