

JUDGMENT OF THE COURT (First Chamber)
13 December 1991

In Case C-164/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Muwi Bouwgroep BV

and

Staatssecretaris van Financiën

on the interpretation of Article 7(1)(b) of Council Directive 69/335/EEC concerning indirect taxes on the raising of capital,

THE COURT (First Chamber),

composed of: Sir Gordon Slynn, President of the Chamber, R. Joliét and G. C. Rodriguez Iglesias, Judges,

Advocate General: F. G. Jacobs,

Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Netherlands Government, by H. J. Heinemann, interim Secretary-General at the Ministry of Foreign Affairs, and subsequently by B. R. Bot, Secretary-General at the same Ministry, acting as Agents,
- the Danish Government, by J. Molde, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by D. Calleja and B. J. Drijber, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 24 September 1991,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1991,

gives the following

Judgment

- 1 By order of 23 May 1990, which was received at the Court on 31 May 1990, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 7(1)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (Official Journal, English Special Edition 1969(11) p. 412) (hereinafter referred to as the 'directive'), as amended by Council Directive 73/79/EEC of 9 April 1973 (Official Journal 1973 L 103, p. 13), by Council Directive 73/80/EEC of 9 April 1973 (Official Journal 1973 L 103, p.

- 15) and by Council Directive 74/553/EEC of 7 November 1974 (Official Journal 1974 L 303, p. 9).
- 2 Those questions were raised in the course of proceedings between Muwi Bouwgroep BV and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the taxation of the transaction by which the capital of that company was constituted.
 - 3 It is apparent from the order for reference that the construction company Van der Vorm Beheer BV (hereinafter referred to as 'Van der Vorm') agreed with Nederhorst Beheer BV ('Nederhorst') that Van der Vorm would 'acquire' or 'cause to be acquired', by companies set up by itself, the subsidiaries of Nederhorst.
 - 4 In order to perform its obligations under that agreement, Van der Vorm set up four companies: Bouw- en Aannemingsbedrijf Nedu BV ('Nedu'), Architectenbureau Multi ontwerp BV ('Multi ontwerp'), Muijs & de Winter's Bouw- en Aannemingsbedrijf BV ('Muwi Rotterdam') and Muijs & de Winter's Betonbouw BV ('Muwi Geleen'). The issued share capital of those companies was, respectively, HFL 50 000, 100 000, 3 200 000 and 6 500 000.
 - 5 The capital of the first three companies — Nedu, Multi ontwerp and Muwi Rotterdam — was paid up in cash. For the purpose of constituting the capital of the fourth company, Muwi Geleen, Van der Vorm transferred to it all the shares which it held in Nedu and paid up the balance in cash. The capital duty due on those transactions was paid.
 - 6 In order to bring the undertakings to be acquired into a separate operating unit, Van der Vorm also set up an intermediate holding company, namely Muwi Bouwgroep, the plaintiff in the main proceedings. The issued share capital of Muwi Bouwgroep, amounting to HFL 10 000 000, was paid up on 30 October 1979 by the transfer of all the shares held by Van der Vorm in its three subsidiary companies, Multi ontwerp, Muwi Geleen and Muwi Rotterdam, with a total value of HFL 9 800 000, the balance of HFL 200 000 being paid up in cash.
 - 7 The Netherlands tax authority levied capital duty of HFL 88 867.01 on the transaction constituting Muwi Bouwgroep's capital. It based its calculation of the amount of duty upon Article 12(1)(a) of the Uitvoeringsbesluit Belastingen van Rechtsverkeer (Implementing Order Taxation of Legal Transactions) (hereinafter referred to as 'the Order') and hence adopted the second method of calculation provided for in Article 35(4) of the Wet op Belastingen van Rechtsverkeer (Law on Taxation of Legal Transactions, hereinafter referred as 'the Law'), applying the rate laid down in Article 36 of the Law.
 - 8 Article 35(4) of the Law provides:
'in the case of a merger or internal reorganization, the capital duty shall be charged, in accordance with the rules to be defined by order, either on the nominal value of the shares of the acquiring company which are allocated less the nominal value of the shares of the acquired company which are transferred, or, in the case of the transfer of assets other than those shares, on the proportion of the nominal value of the transferring company's share capital represented by those assets'.
 - 9 Article 12 of the Order provides that
 - '1. The method of calculating capital duty laid down in Article 35(4) of the Law only applies to internal reorganizations in the following cases:
 - (a) if a company with capital divided into shares sets up another similar company and transfers to that other company solely its entire undertaking or an independent part of that undertaking in exchange for the acquisition of all or substantially all the shares of the latter company;
 - (b) if companies which form part of a group transfer similar capital goods owned by them to a single company in that group;

- (c) if a company forming part of the group and with capital divided into shares transfers solely its entire undertaking or an independent part of that undertaking to another company in that group.'
- 10 Article 36 of the Law provides that the rate of capital duty is 1%. No reduced rate is provided for.
- 11 Muwi Bouwgroep appealed to the Netherlands courts against the tax authority's decision. In the proceedings before the Gerechtshof, (Regional Court of Appeal) the tax authority reconsidered its position. It considered that the transaction fell under another provision of the Law, namely Article 35(1), and that the capital duty ought therefore to have been assessed at HFL 98 000.
- 12 Article 35(1), cited above, provides that the duty is charged on the value transferred after deduction of the liabilities assumed by the company, or on the nominal value of the shares if the latter is greater.
- 13 After the Gerechtshof found for the tax authority, Muwi Bouwgroep lodged an appeal in cassation before the Hoge Raad. In the order for reference the Hoge Raad considered that, in accordance with Article 12(1)(a) of the Order, it was the second method of calculation laid down in Article 35(4) of the Law which was to be applied to the transaction in dispute. Consequently, it reduced the capital duty to HFL 84 849.84.
- 14 Before the Hoge Raad, Muwi Bouwgroep contended that the transaction in question fell within Article 7(1)(b) of the directive and that, accordingly, the capital duty payable could not exceed HFL 50 000. Consequently, it claimed that the system established by the Law, taken as a whole, was contrary to the directive to the extent that it provided for a rate of duty and a basis of assessment which were different from those provided by Community law for the capital duty.
- 15 Article 7(1)(a) of the directive, as amended, provides that as a rule the rate of capital duty is to be 1%. However, Article 7(1)(b) requires the Member States to reduce the capital duty to a rate between 0 and 0.5% 'when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in existence'. This mandatory reduction is subject to the condition that 'the consideration for the contributions shall consist exclusively of the allocation of shares in the company or companies although the Member States shall have the right to extend application of the reduction to cases in which the consideration for contributions consists of the allocation of shares in the company or companies together with a payment in cash not exceeding 10% of the nominal value of the shares'.
- 16 Article 5(1)(a) of the directive which lays down the basis of assessment for capital duty provides that, in such a case, the capital duty shall be charged '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'. Article 5(2) of the directive allows, in addition, a Member State to retain as the basis for assessment of capital duty the actual value of the shares in the company allotted or belonging to each member unless the contributions are made only in cash. However, the amount on which the capital duty is charged may not in any case be less than the nominal amount of such shares.
- 17 It is against that background that the Hoge Raad decided to stay the proceedings pending a ruling from the Court of Justice on the following questions:
- (1) Where the assets and liabilities of a capital company include a parcel of shares which constitutes a 100% share in another capital company, may that parcel of shares be regarded as a 'part of the business' of the company which holds them within the meaning of Article 7(1)(b) of Directive 69/335/EEC of 17 July 1969, even if the assets of the subsidiary consist at the time solely of liquid assets?

- (2) If so, does it follow from that directive that in this case capital duty may not exceed 0.5% of HFL 10 000 000 —that is HFL 50 000 — or may the company nevertheless be charged HFL 84 849.84 on the ground that the rules laid down in Article 35(4) of the Wet op Belastingen van Rechtsverkeer in conjunction with Article 12(1) of the Uitvoeringsbesluit Belastingen van Rechtsverkeer are, taken as a whole, in conformity with the directive?'
- 18 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

- 19 In its first question, the Hoge Raad asks the Court whether the contribution of a parcel of shares which one company holds in another company and which represents 100% of the capital of that other company constitutes the transfer of a part of the business of the first company within the meaning of Article 7(1)(b) of the directive.
- 20 In order to answer this question the provision concerned must be considered as a whole.
- 21 Whilst Article 7(1)(b) obliges the Member States to reduce the capital duty when a company transfers to another all its assets and liabilities or a part of its business, Article 7(1)(bb) gives Member States the option to reduce capital duty 'where a capital company which is in the process of being formed or which is already in existence acquires shares representing at least 75% of the issued share capital of another capital company'.
- 22 It is clearly apparent from the wording of Article 7(1)(b) and, in particular, the reference in it to the concept of 'assets and liabilities' that it concerns the case where a company transfers to another various items which, whether they constitute all or only part of its assets and liabilities, form an entity capable of operating independently.
- 23 Article 7(1)(bb) was added, as the amending Directive — 73/79 — indicates in its preamble, to permit the extension of the reduced rate to regroupings of companies which, economically speaking, produce similar effects to the reconstruction operations referred to in Article 7(1)(b) but follow a different legal procedure inasmuch as they are concerned with cases in which a company 'acquires, in exchange for its own shares, a proportion of the shares in another company such that it obtains complete control of such other company'.
- 24 Since transactions involving the transfer of shares are the subject of a special provision, they cannot be governed at the same time by Article 7(1)(b) of the directive. In this respect it is of little importance that the shares transferred represent 100% of the subscribed share capital. Article 7(1)(bb) does not draw any distinction in this respect.
- 25 Accordingly, the reply to be given to the national court's question is that the transfer of a parcel of shares which one company holds in another company and which constitutes 100% of the capital of that other company is not to be regarded as the transfer of part of the business of the first company within the meaning of Article 7(1)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directives 73/79/EEC and 73/80/EEC of 9 April 1973.

The second question

- 26 In view of the answer to the first question, the second question does not require an answer.

Costs

- 27 The costs incurred by the Netherlands Government, the Danish Government and the Commission of the European Communities, 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 (First Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by order of 23 May 1990, hereby rules:

The transfer of a parcel of shares which one company holds in another company and which constitutes 100% of the capital of that other company is not to be regarded as the transfer of part of the business of the first company within the meaning of Article 7(1)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directives 73/79/EEC and 73/80/EEC of 9 April 1973.