

JUDGMENT OF THE COURT (First Chamber)

18 May 2006

(Indirect taxes on the raising of capital – Directive 69/335/EEC – Article 7(1)(b) and (bb) – Capital duty – Exemption – Requirements – Retention for a period of five years of shares acquired)

In Case C-509/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 10 December 2004, received at the Court on the same date, in the proceedings

**Magpar VI BV**

v

**Staatssecretaris van Financiën,**

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, K. Lenaerts, E. Juhász (Rapporteur) and M. Ilešič, Judges,

Advocate General: A. Tizzano,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Netherlands Government, by H.G. Sevenster and M. De Grave, acting as Agents,
- the Commission of the European Communities, by M. Afonso and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 January 2006,

gives the following

**Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Article 7(1)(b) and (bb) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the

raising of capital (OJ, English Special Edition, Series I 1969 (II), p. 412), as amended by Council Directive 73/79/EEC of 9 April 1973 (OJ 1973 L 103, p. 13) and by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) ('Directive 69/335').

- 2 The reference was made in the course of proceedings between Magpar VI BV ('Magpar') and the Netherlands tax authorities concerning their refusal to grant Magpar an exemption from capital duty on the raising of capital in accordance with Article 7(1) of Directive 69/335.

## **Legal context**

### *Community legislation*

- 3 As stated in the first recital in the preamble thereto, the purpose of Directive 69/335 is to promote the free movement of capital in order to create an economic union whose characteristics are similar to those of a domestic market. To that end, as appears from the sixth, seventh and eighth recitals, that directive is designed to harmonise duty on capital contributions to companies within the European Community by introducing a single duty on the raising of capital that can be charged only once within the common market and by abolishing all other indirect taxes with the same characteristics as that single capital duty.
- 4 Thus, under Article 1 of Directive 69/335, 'Member States shall charge on contributions of capital to capital companies a [harmonised] duty ...'.
- 5 Article 7(1) of Directive 69/335 provides that:

'Until the entry into force of the provisions to be adopted by the Council in accordance with paragraph 2:

- (a) the rate of capital duty may not exceed 2% or be less than 1%;
- (b) this rate shall be reduced by 50% or more 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 reduction shall be subject to the condition that:

- the consideration for the contributions shall consist exclusively of the allocation of shares in the company or companies, although 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;
- the companies taking part in the transaction have their effective centre of management or their registered office within the territory of a Member State;

...'

- 6 Directive 73/79 added to Article 7(1) of Directive 69/335 a subparagraph (bb), which is worded as follows:

‘[T]he rate of capital duty may be reduced by 50% or more 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. Where the said percentage is reached by means of two or more transactions, the reduced rate shall apply only to the transaction whereby this percentage is reached and to subsequent transactions.

However, the amount of the duty which by virtue of this provision is not charged shall become due if the company which acquires the shares does not retain, for a period of five years from the date of the transaction qualifying for the reduced rate, at least 75% of the share capital of that company and all the shares of the other company which it holds following that transaction, including shares acquired before the transaction and held at the time thereof. However, the reduced rate shall remain applicable if during the relevant period the shares in question are transferred in the course of a transaction qualifying for the reduced rate pursuant to the foregoing sub-subparagraph or to subparagraph (b) of this paragraph or on liquidation of the company which acquired the shares.

This reduction shall be subject to the condition that:

- the consideration for the shares acquired shall consist exclusively of the allocation of shares in the acquiring company, although the Member States may extend application of the reduction to cases where the consideration for the shares acquired consists of the allocation of shares in the acquiring company together with a payment in cash not exceeding 10% of the nominal value of these shares;
- both companies taking part in the transaction, the company acquiring the shares and the company whose shares are acquired, have their effective centre of management or their registered office within the territory of a Member State.’

- 7 The reason for permitting a reduced rate of capital duty is explained in the two recitals in the preamble to Directive 73/79:

‘Whereas Article 7(1)(b) of ... Directive [69/335] ... provides for the application of a reduced rate of capital duty to certain company reconstruction operations involving the transfer of assets;

Whereas provision should be made to permit the extension of such reduced rate to transactions whereby a company which is in the process of being formed or is already in existence 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; whereas such transactions should be regarded in the same light, from the economic point of view, as the reconstruction operations to which Article 7(1) (b) applies’.

- 8 Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15) made provision for a further reduction in the rates of capital duty. Under Article 1 thereof:

‘The rate of the capital duty provided for in Article 7 [of Directive 69/335] shall, with effect from 1 January 1976, be 1%.’

9 Article 2 of Directive 73/80 provides that:

‘The reduced rates provided for in Article 7(1)(b) and (bb) of ... Directive [69/335] shall, with effect from 1 January 1976, be any rate between 0% and 0.50%.’

10 The second recital in the preamble to Directive 85/303 states that ‘the economic effects of capital duty are detrimental to the regrouping and development of undertakings’. However, in view of the fact that the loss of revenue which would result from the abolition of capital duty would be unacceptable for certain Member States, it is stated in the third recital in the preamble to that directive that ‘the Member States must ... be given the opportunity to exempt from or subject to capital duty all or part of the transactions coming within its scope’.

11 Moreover, after it is stated in the fourth recital in the preamble to Directive 85/303 that ‘there should be mandatory exemption for the transactions currently subject to the reduced rate of capital duty’, Article 1(2) of that directive goes on to replace Article 7 of Directive 69/335 with the following:

‘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.

...’

12 Thus, as regards the conditions for exemption from capital duty, Directive 85/303 refers to Article 7(1)(b) and (bb) of Directive 69/335.

#### *National legislation*

13 The abovementioned provision of Directive 69/335 was implemented in Netherlands law by Article 37 of the Law on the taxation of legal transactions (Wet op belastingen van rechtsverkeer, Stb. 1970, No 611), as amended by the Law of 13 December 1996 (Stb. 1996, No 652) (‘WBR’). That article provides that:

‘1. In accordance with conditions to be laid down by rules of a general nature, contributions of capital shall be exempt from duty in the following cases:

(a) in the case of merger, division or internal restructuring;

...

2. The exemption provided for at subparagraph (1)(a) shall apply only where:

(a) a body with capital divided into shares obtains, in exchange for the allotment of its own shares, exclusively shares in another such body, and, as a result of

that transaction, acquires at least 75% of the shares in that body or holds at least 75% of its share capital;

- (b) a body with capital divided into shares obtains, in exchange for the allotment of its own shares, exclusively the entire assets and liabilities of another such body, its entire business or the entire business of a part of it;

...'

14 Article 14 of the Decree of 22 June 1971 implementing the abovementioned Law (Stb. 1971, No 393), as amended by the Decree of 27 February 1996 (Stb. 1996, No 144), lays down detailed rules governing exemption from capital duty. That article provides that:

- '1. The amount of duty which by virtue of Article 37(1)(a) of the Law is not charged in the case of a merger under Article 37(2)(a) of the Law shall become payable, however, by the body if, within five years following the allocation of the shares, that body no longer holds all the shares it acquired in the other body or those shares it already held at the time of that transaction, or at least 75% of the shares in that other body.
- 2. Paragraph 1 shall not apply in the case of a disposal of shares in the course of a merger or internal restructuring under Article 37(2) of the Law, or in the case of the dissolution or liquidation of the body which had acquired the shares.'

15 Under Article 309 of Book 2 of the Netherlands Civil Code (Burgerlijk Wetboek, Boek 2) a legal merger is a legal transaction by two or more legal persons by which one of them acquires the assets of the other under universal title or by which another legal person established jointly by them by virtue of that transaction acquires their assets under universal title. Pursuant to Article 311(1) of Book 2, with the exception of the legal person acquiring the assets, the legal persons which are merging cease to exist as a result of the coming into force of the merger.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

16 As appears from the order for reference, in 1998 five private companies entered into partnership as Magnus Management Consultants. The shares in those five companies ('the old companies') were held by five different natural persons, each of whom, as sole shareholder, held all the issued share capital in one company.

17 Magpar, Magpar VIII BV and Magpar XI BV were established on 17 August 1998, followed on 31 August 1998 by Magpar II BV and Magpar V BV ('the new companies'). At a date not specified, but on or about 31 August 1998, the new companies acquired, exclusively by way of return for shares, all of the shares in the old companies. Magpar thus acquired all of the shares in M. J. Hoffmann Beheer BV ('Hoffmann'), one of the old companies.

18 The contribution of the Hoffmann shares to Magpar was exempt from capital duty under Article 37(1)(a) and (2)(a) of the WBR.

- 19 On 31 August 1998, Magnus Holding NV ('Holding') was established in the course of a legal merger within the meaning of Article 309 of Book 2 of the Netherlands Civil Code. Under that merger, Holding acquired the assets of the old companies under universal title, including those of Hoffmann. The new companies acquired, by virtue of that merger, shares in Holding proportionate to the amount they had contributed. Magpar thus received shares in Holding proportionate to the amount of assets the latter had acquired in Hoffmann.
- 20 Also on 31 August 1998, a cooperative within the meaning of Article 53 of Book 2 of the Netherlands Civil Code, Coöperatie Pym UA ('the cooperative'), was established and a number of companies, including Magpar, became members. On the same date, Magpar transferred its shares in Holding to the cooperative in exchange for membership rights in that cooperative.
- 21 On 27 November 1998, the stock of Holding was quoted on the Amsterdam Stock Exchange.
- 22 On 5 February 1999, Magpar received a notice of supplementary assessment to capital duty in the sum of NLG 87 782, which, following an appeal, was confirmed by the Netherlands tax authorities. The Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) having held that the action brought by Magpar was unfounded, the latter appealed in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- 23 The Hoge Raad finds that a legal merger, as governed by Netherlands law, is a transaction to which exemption from capital duty applies. As a consequence, Holding's acquisition of the assets of the old companies under universal title was exempt from capital duty. Thus, in accordance with the second sentence of the second sub-paragraph of Article 7(1)(bb) of Directive 69/335, the five-year retention period laid down by the first sentence of that provision cannot be relied on against Magpar with regard to the transfer of the Hoffmann shares to Holding. However, in the light, in particular, of its previous case-law, the Hoge Raad entertains doubts as to whether the retention obligation was transferred to the shares in Holding held by Magpar following Holding's acquisition of the shares in Hoffmann and whether, consequently, as a result of the transfer of the shares it held in Holding to the cooperative, Magpar had incurred liability to capital duty.
- 24 The Advocate General of the Hoge Raad, whose Opinion is attached to the order for reference, takes the view that such a transfer of the prohibition on disposals would mean that, in order to qualify for an exemption, a transaction such as a merger by exchange of shares would be subject to an additional condition, whereas the wording of Directive 69/335 does not permit this, particularly as that transfer would be to the detriment of the party liable for payment. For that reason, the Advocate General concluded that the matter should be referred to the Court of Justice for a preliminary ruling.
- 25 It was in those circumstances that the Hoge Raad decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
  - '(1) Is Article 7(1)(bb) of Directive 69/335, as amended by Directive 73/79, to be interpreted as meaning that if a company, within five years after the acquisition of

shares in the course of a share merger that is exempt from capital duty, ceases to hold those shares because the company in which the shares were held has itself been the subject of a merger, the requirements laid down by that provision are to apply to the shares in the acquiring company?

- (2) Is it relevant to the above question that the company in which the shares were held ceased to exist as a result of the coming into force of a legal merger with another company (Article 311(1), Book 2, of the Civil Code), so that it is not possible to speak of a disposal of shares in the literal sense?’

## **The questions**

### *Question 1*

- 26 The Netherlands Government submits that it is necessary, in order to answer this question, to have regard to the objective set out in the second recital in the preamble to Directive 73/79, which is to promote transactions that can be regarded in the same light as the reconstruction operations referred to in Article 7(1)(b) of Directive 69/335, that is to say, transactions whereby an undertaking acquires a proportion of the shares in another company so that it obtains complete control over such other company. The requirement to retain the shares acquired for a period of five years, on which the exemption from capital duty is based, is thus designed to ensure that the influence of the acquiring company is maintained. The maintaining of that influence should be guaranteed in the event of a further disposal of the shares initially acquired in the course of a transaction that is also exempt from capital duty since, by means of such a transaction, the transferring undertaking acquires shares in consideration for the shares it transferred.
- 27 In the opinion of the Netherlands Government, the obligation to retain shares for a period of five years is thus transferred to the shares acquired in the course of the second transaction that is exempt from capital duty, which replaced the shares initially acquired since, otherwise, a disproportionate tax advantage would be conferred on the second transaction. Thus, in effect, the obligation upon Magpar to retain the shares in Hoffmann for five years was transferred, with regard to what remained of the five-year period at the time of the second transaction, to the shares in Holding acquired as a result of that transaction in exchange for the shares in Hoffmann.
- 28 Concurring in the view expressed in his Opinion by the Advocate General of the Hoge Raad, the Commission of the European Communities refers to the wording of Article 7(1)(bb) of Directive 69/335, which does not provide that a further prohibition on disposals should apply to shares received in consideration for shares initially acquired in the course of transactions such as those at issue in the main proceedings. As a consequence, the initial prohibition on disposals is not transferred to the shares subsequently acquired in consideration for the capital contribution of the company concerned.
- 29 Thus, in the opinion of the Commission, if, within a period of five years, the company concerned ceases to hold shares initially acquired in the course of a transaction exempt from capital duty as a result of a transaction that is also exempt from capital duty, the exemption remains valid without any further condition. In effect, the obligation on

Magpar to retain the shares in Hoffmann for a period of five years was therefore not transferred to the shares in Holding acquired by Magpar in exchange for the shares in Hoffmann.

- 30 In order to give a helpful answer to the first question, which reflects the main difficulty faced by the national court, it should be stated at the outset that the obligation to retain for a period of five years shares in a capital company acquired by another capital company applies equally to the transactions falling within Article 7(1)(bb) of Directive 69/335, namely, transactions involving the acquisition of shares representing at least 75% of the issued share capital of a capital company in consideration for the allocation of shares in the acquiring company.
- 31 By contrast, such an obligation is not imposed with regard to reconstruction operations under Article 7(1)(b) of that directive, that is to say, transactions involving the acquisition of either all the assets and liabilities of a capital company or one or more parts of its business by another capital company in consideration for the allocation of shares in the latter.
- 32 That is the unequivocal conclusion to be drawn from the wording of Article 7(1) of Directive 69/335, as supplemented by Directive 73/79. In fact, the latter directive did not amend subparagraph (b) of the provision in question but added subparagraph (bb), which lays down, with regard to the transactions referred to in that subparagraph, an obligation to retain the shares acquired for a period of five years.
- 33 It is clear from the order for reference that the first transaction at issue in the main proceedings, namely Magpar's acquisition of Hoffmann, falls within Article 7(1)(bb) of Directive 69/335. In consideration for the allocation of its own shares, Magpar acquired all of the assets and liabilities in Hoffmann, which continued to exist as a company. In order, therefore, to maintain the benefit of the exemption under that provision, Magpar was accordingly obliged to retain the shares in Hoffmann for a period of five years from the date when the transaction was effected, unless those shares were transferred in the course of a transaction that was itself exempt on the basis of Article 7(1)(b) or (bb) of Directive 69/335.
- 34 It is also clear from the order for reference, and particularly the Opinion of the Advocate General of the Hoge Raad attached to that order, that the second transaction that falls to be considered in the main proceedings, that is to say, Holding's acquisition of Hoffmann, falls within Article 7(1)(b) of Directive 69/335 and was, on that basis, also exempt from capital duty. Holding acquired by legal merger and under universal title the assets in Hoffmann held by Magpar in consideration for the allocation of its own shares to the latter company.
- 35 In the present case, the national court asks whether the obligation on Magpar to retain the shares in Hoffmann for five years was transferred, with regard to what remained of that five-year period, to the shares in Holding acquired by Magpar in the course of the second merger transaction and, if so, whether Magpar lost its entitlement to the exemption on the basis that it no longer held those shares in Holding, as a result of the third transaction effected during that period, which were exchanged for membership rights in the cooperative.

- 36 The solution to that question is connected with the fact that the second transaction, which in the present case is decisive, namely, Holding's acquisition under universal title of the assets in Hoffmann, falls within Article 7(1)(b) of Directive 69/335. As was explained at paragraphs 30 and 31 above, the obligation to retain shares acquired in a capital company for five years does not apply to operations involving the restructuring of undertakings under that provision because, in the present case, the loss of those shares led to Holding's acquisition of the assets in Hoffmann under universal title and also because Hoffmann itself ceased to exist.
- 37 Such an interpretation is consistent not only with the wording of the provision under consideration but also with developments in the abovementioned Community directives concerning indirect taxes on the raising of capital, as set out at paragraphs 5 to 12 above. Thus, Directive 73/79 extended the field of application of the reduced rates of capital duty, Directive 73/80 lowered the rate of capital duty and gave the option of applying further reductions to that rate, whilst Directive 85/303 gave Member States the opportunity to exempt from capital duty all or part of the transactions coming within its scope and exempted transactions which hitherto had been subject to reduced rates.
- 38 Moreover, that interpretation is consistent with the spirit and the purpose of the legislation in question, which is designed to facilitate progressively the movement of capital linked to the concentration of undertakings and to give the latter the opportunity to adopt, without unnecessary obstacles, the company structures and forms that are best fitted to meet the demands of economic reality and continual growth.
- 39 Lastly, as noted by the Advocate General of the Hoge Raad in his Opinion, as well as the Advocate General of the Court of Justice at points 31 to 37 of his Opinion and the Commission, the converse solution would make the retention of the exemption from capital duty subject to an additional condition, which, from the perspective of the legislation in question, would amount to an unnecessary requirement damaging to transactions involving the restructuring of undertakings. In such circumstances, it must be considered that, had the Community legislature wished to introduce such a requirement, it would have made express provision for it.
- 40 It follows from the foregoing that Article 7(1)(b) and (bb) of Directive 69/335 must be interpreted as meaning that, where a first capital company, within five years after the acquisition of shares in a second capital company in the course of a share merger that is exempt from capital duty, ceases to hold those shares because the second company has itself merged with a third capital company and has, as a result, ceased to exist, the first company having acquired shares in the third company by way of consideration, the requirement to retain for a period of five years the shares initially acquired, laid down by subparagraph (bb) of the provision in question, is not transferred to the shares the first company holds in the third company.

### *Question 2*

- 41 The second question asks whether it is relevant for the purposes of answering the first question that the second sentence of the second sub-subparagraph of Article 7(1)(bb) of Directive 69/335 refers to a 'transfer' ('... if ... the shares in question are transferred ...'), whereas, where a merger is involved, the company acquired ceases to exist, as is

the case in the main proceedings, so that it is not possible to speak of a disposal of shares in the literal sense.

- 42 As is clear from point 4.3.9 of the Opinion of the Advocate General of the Hoge Raad, the reason for that question is the fact that, under Netherlands law, in the case of a legal merger, shares in an acquired company held by a shareholder become extinct and the latter automatically receives shares in the acquiring company by way of consideration.
- 43 It should be noted in that regard that merger operations, in their various forms, are conceived of in broad terms by Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36), from which it is possible to deduce, by analogy, some practical guidance on the answer to the question under consideration. Article 3(1) of that directive defines merger by acquisition as ‘the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company’. The same terms are used, *mutatis mutandis*, in Article 4(1) of that directive, concerning mergers by the formation of a new company, and in Article 24 in relation to the acquisition of a company by another which is the holder of all of the shares in that company.
- 44 Directive 69/335 does not define the concept of ‘transfer’, other than to refer to the laws of the Member States for such purpose. That concept must therefore be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, to that effect, Case C-55/02 *Commission v Portugal* [2004] ECR I-9387, paragraphs 44 and 45, and the case-law cited).
- 45 Therefore, in view, in particular, of the fact that the second sentence of the second sub-paragraph of Article 7(1)(bb) of Directive 69/335 is designed to maintain the entitlement to tax exemption intended by Community legislation, as set out above, the words ‘if ... the shares in question are transferred’ must be regarded as having meaning in Community law and must not be interpreted narrowly. That wording encompasses a merger transaction by way of acquisition as a result of which the shares in the acquired company become extinct and the holders of those shares receive in exchange shares in the acquiring company.
- 46 Even if, in accordance with the law of a Member State, the extinction of shares in an acquired company and the allocation of shares in an acquiring company constitute separate legal situations, they are none the less inseparable from an economic point of view in so far as the shares in the acquiring company are allocated in exchange for shares in the acquired company proportionate to the value of those shares. In that regard, the legal mechanism whereby a merger is implemented under national law cannot have any bearing on whether there is any actual, close economic connection. The concept of ‘transfer’ in that context must, therefore, be regarded as a generic concept encompassing such transactions.
- 47 The answer to the second question must therefore be that the fact that the second sentence of the second sub-paragraph of Article 7(1)(bb) of Directive 69/335 refers

to a 'transfer' of shares held as a result of a transaction that is exempt from capital duty is not relevant to the first question.

### **Costs**

- 48 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 (First Chamber) hereby rules:

- 1. Article 7(1)(b) and (bb) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 73/79/EEC of 9 April 1973 and by Council Directive 85/303/EEC of 10 June 1985, must be interpreted as meaning that, where a first capital company, within five years after the acquisition of shares in a second capital company in the course of a share merger that is exempt from capital duty, ceases to hold those shares because the second company has itself merged with a third capital company and has, as a result, ceased to exist, the first company having acquired shares in the third company by way of consideration, the requirement to retain for a period of five years the shares initially acquired, laid down by subparagraph (bb) of the provision in question, is not transferred to the shares the first company holds in the third company.**
- 2. The fact that the second sentence of the second sub-subparagraph of Article 7(1)(bb) of Directive 69/335, as amended by Directives 73/79 and 85/303, refers to a 'transfer' of shares held as a result of a transaction that is exempt from capital duty is not relevant to the first question.**