JUDGMENT OF THE COURT (First Chamber)
28 March 1990

In **Case C-38/88**

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Münster for a preliminary ruling in the proceedings pending before that court between

Waldrich Siegen Werkzeugmaschinen GmbH

and

Finanzamt (Finance Office) Hagen,

on the interpretation of Article 4 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (Official Journal, English Special Edition 1969 (II), p. 412),

THE COURT (First Chamber)

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

Advocate General: M. Darmon

Registrar: H. A. Rühi, Principal Administrator

after considering the observations submitted on behalf of

Finanzamt Hagen, the defendant in the main proceedings, by Mr "Weiß,

the Commission of the European Communities, by its Legal Adviser Henri Etienne, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 8 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 December 1989,

gives the following

Judgment

1 By order of 11 January 1988, which was received at the Court Registry on 2 February 1988, the Finanzgericht (Finance Court) Münster referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 4(2)(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 (II), p. 412, hereinafter referred to as 'the directive on the raising of capital').

2 The questions were raised in the course of proceedings between Waldrich Siegen Werkzeugmaschinen GmbH (hereinafter 'Siegen') and the Finanzamt Hagen (hereinafter 'the Finanzamt') concerning the levying of capital duty on the transfer of losses incurred by Siegen to Ingersoll Maschinen und Werkzeuge GmbH (hereinafter 'Ingersoll'), its sole shareholder.

3 In 1971 Siegen and Ingersoll concluded a 'profit and loss transfer agreement' (Ergebnisabführungsvertrag) under which Ingersoll undertook to take over Siegen's debts, whilst Siegen undertook to transfer its profits to Ingersoll. Initially, Siegen realized profits, but it later suffered losses over a period of four consecutive financial years. The Finanzamt thereupon called on Siegen to pay capital duty at 1% of the amount of those losses, relying on Article 2 of the Kapitalverkehrsteuergesetz (Capital Transaction Tax Law, hereinafter 'the national Law'), according to which the absorption by the parent company of the losses of its subsidiary pursuant to a profit and loss transfer agreement is to be regarded as a contribution subject to capital duty.

4 In support of its action for the annulment of the Finanzamts decision, Siegen claimed in the proceedings before the Finanzgericht Münster that Article 2 of the national Law was contrary to Article 4(2)(b) of the directive. Under that provision capital duty may be levied on 'an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which ... may increase the value of the company's shares'. According to Siegen the absorption by a shareholder of a company's losses does not increase the assets of that company.

5 In those circumstances the Finanzgericht Münster decided to stay the proceedings and to submit for a preliminary ruling two questions concerning the interpretation of Article 4 of the directive. Those questions are worded as follows:

'(1) May taxable persons (individuals) residing in a Member State rely directly on Article 4 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, once the period referred to in Article 13 thereof has expired?

(2) If question 1 is answered in the affirmative, is Paragraph 2(1)(2) of the Kapitalverkehrsteuergesetz (Capital Transaction Tax Law) 1972 of the Federal Republic of Germany, read in conjunction with Paragraph 2(2)(1) thereof, compatible with Article 4 of Council Directive 69/335/EEC?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts and relevant legislation and for the account of the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

7 In its first question the Finanzgericht asks whether a taxable person may, in proceedings before his national courts, rely on Article 4(2)(b) of the directive on the raising of capital.

8 The relevant provision of the directive prohibits Member States from seeking to collect capital duty when a contribution received by the company does not increase its assets.

That prohibition is by its very nature precise and unconditional. A taxable person may therefore rely on that prohibition on proceedings before a national court if the national authorities nevertheless seek to collect capital duty on the basis of a provision of national law.

9 The reply to be given to the first question submitted by the national court must therefore be that a taxable person may, in proceedings before his national court, rely on Article 4(2)(b) of the directive on the raising of capital.

Second question

10 In its second question the Finanzgericht Münster seeks to establish, in essence, whether the absorption of a company's losses by a shareholder pursuant to a profit and loss transfer agreement increases the assets of that company for the purposes of Article 4(2)(b) of the directive on the raising of capital.

11 It should first be noted that by virtue of the relevant provision of the directive capital duty may be levied only on shareholder's contributions which enable a capital company to increase its assets but do not increase its capital.

12 A company's assets include all the property which the shareholders have contributed, together with any increase in its value. A company which realizes a profit and adds it to its reserves thereby increases its assets. Conversely, the assets of a company which incurs losses will decline.

13 That being so, when a company has incurred losses and one of its shareholders agrees to absorb those losses, that shareholder makes a contribution which increases the assets of the company. He restores the assets to the level which they had reached before the losses were sustained. It is a different matter when the shareholder absorbs the losses by virtue of an undertaking which he entered into before those losses were sustained. The undertaking means that any losses which the company may subsequently incur will have no effect on the level of its assets.

14 Accordingly, the answer to be given to the second question submitted by the national court is that the absorption of a company's losses by a shareholder pursuant to a profit and loss transfer agreement concluded before those losses are determined does not increase the assets of that company for the purposes of Article 4(2)(b) of the directive on the raising of capital.

Costs

15 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action 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 Finanzgericht Münster, by order of 11 January 1988, hereby rules that:

(1) A taxable person may, in proceedings before his national court, rely on Article 4(2)(b) of the directive on the raising of capital.

(2) The absorption of a company's losses by a shareholder pursuant to a profit and loss transfer agreement concluded before those losses are determined does not increase the assets of that company for the purposes of Article 4(2)(b) of the directive on the raising of capital.