

JUDGMENT OF THE COURT (First Chamber)

1 December 2011

(Taxation – Directive 69/335/EEC – Indirect taxes – Raising of capital – Article 4(2)(b) – Transactions subject to capital duty – Increase in the assets of a company – Contribution made by a member – Absorption of losses by virtue of an undertaking given before the losses were sustained)

**In Case C-492/10,**

REFERENCE for a preliminary ruling under Article 267 TFEU from the Unabhängiger Finanzsenat, Außenstelle Linz (Austria), made by decision of 6 October 2010, received at the Court on 14 October 2010, in the proceedings

**Immobilien Linz GmbH & Co. KG**

v

**Finanzamt Freistadt Rohrbach Urfahr,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, A. Borg Barthet (Rapporteur), E. Levits and J.-J. Kasel, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 8 September 2011,

after considering the observations submitted on behalf of:

- Immobilien Linz GmbH & Co. KG, by J. Mitterer, Rechtsanwalt,
- Finanzamt Freistadt Rohrbach Urfahr, by G. Wöss, acting as Agent,
- the Austrian Government, by C. Pesendorfer and F. Koppensteiner, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and G. Aiello, avvocato dello Stato,
- the European Commission, by L. Lozano Palacios and W. Mölls, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns 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 (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) ('Directive 69/335').
- 2 The reference has been made in proceedings between Immobilien Linz GmbH & Co. KG ('Immobilien Linz'), formerly Immobilien Linz GmbH & Co. KEG ('Immobilien Linz KEG'), and Finanzamt Freistadt Rohrbach Urfahr (Freistadt Rohrbach Urfahr Tax Office; 'the Finanzamt') concerning the charging of capital duty on the absorption by the City of Linz (Austria), which is the sole shareholder of that company, of the losses incurred by it in 2006.

### **Legal context**

#### *European Union legislation*

- 3 Article 1 of Directive 69/335 provides:  
  
‘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”.’
- 4 Article 3 of the directive defines a capital company within the meaning of the directive. Article 3(2) provides:  
  
‘For the purposes of the application of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.’
- 5 Under Article 4(2) of the directive:  
  
‘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:  
  
...  
  
(b) 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 do result in variation in the rights in the company or which may increase the value of the company’s shares.  
  
...’

*Austrian legislation*

- 6 Paragraph 2(2) and (4) of the Law on tax on capital transactions (Kapitalverkehrsteuergesetz), in the version applicable in the main proceedings (BGBl. I, No 52/2009; ‘the KVG’), provides:

‘The following shall be subject to capital duty:

2. contributions made by the members of a domestic capital company on the basis of an obligation arising from the company relationship (for example, further contributions and additional payments). Where a member’s obligation is covered by means of the company’s own funds, that shall be equivalent to a member’s contribution.

...

4. the following voluntary contributions by a member to a domestic capital company if the contribution may increase the value of the rights in the company:

(a) grants

...’

- 7 Paragraph 4 of the KVG, headed ‘capital company’, provides, in paragraph 2:

‘The following are also capital companies for the purposes of this Law:

1. limited partnerships (“Kommanditgesellschaften”, “KG”) where a capital company is one of the partners personally liable;
2. limited trading partnerships (“Kommandit-Erwerbsgesellschaften”, “KEG”), where a capital company is one of the partners personally liable;

...’.

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

- 8 At its meeting on 16 December 2004, the municipal council of the City of Linz decided to hive off the city’s property assets and transfer responsibilities for current asset management and exploitation to Immobilien Linz GmbH and to Immobilien Linz KEG (now Immobilien Linz). At that meeting, it was also decided that, starting from the 2005 financial year, the City of Linz would grant an annual member’s contribution to both those property firms in the amount provisionally specified in that regard in each budget estimate.
- 9 Immobilien Linz KEG was founded by an agreement of 22 April 2005. The partner with unlimited liability is Immobilien Linz GmbH, whose sole shareholder is the City of Linz. The City of Linz is also the sole limited partner of Immobilien Linz.

- 10 On 21 December 2005, the supervisory board of Immobilien Linz approved a business plan for 2006. On the same date, the City of Linz, represented by its mayor, undertook to grant a member's contribution to Immobilien Linz to cover its losses as necessary, but up to the maximum amount of EUR 11 862 000 envisaged in the business plan. The contribution was granted on the basis of the municipal council's decision of 16 December 2004.
- 11 The City of Linz actually granted Immobilien Linz EUR 11 645 290.17 for 2006.
- 12 By decision of 29 January 2008, the Finanzamt assessed the capital duty at EUR 116 452.90, namely 1% of the grant actually awarded. That decision is reasoned as follows:

‘According to settled case-law, the provision of services by members to their company is subject to capital duty. Only the absorption of losses pursuant to a lasting profit and loss transfer agreement is not subject to capital duty. In the case of a financing commitment made by a member on the basis of a detailed financial plan, subsequent contributions do not constitute compulsory contributions under Paragraph 2(2) of the KVG. They are voluntary members' contributions which are liable to capital duty under Paragraph 2(4)(a) of the KVG.’
- 13 Immobilien Linz brought an action against the decision of the Finanzamt before the referring tribunal alleging that, by the decision of the municipal council of 16 December 2004 and its general decision authorising the covering of losses connected with the management of the property assets of the City of Linz, the latter, in its capacity as a member, entered into an obligation, arising from the company relationship, to cover the losses incurred by Immobilien Linz.
- 14 The referring tribunal is doubtful whether the legal arrangements under which the member has undertaken to cover the company's future losses are decisive as regards the existence of an increase in the assets of a company within the meaning of Article 4(2)(b) of Directive 69/335. According to the referring tribunal, on the one hand, the Austrian tax authorities and the national courts proceed on the basis that it is only the absorption of losses pursuant to a profit and loss transfer agreement that does not lead to an increase in the assets of the company. On the other hand, the Court of Justice, in Case C-38/88 *Siegen* [1990] ECR I-1447, adopted the single criterion, for the purposes of determining whether there is an increase in the company's assets, of whether the member's obligation to cover losses exists in advance, so that the losses which the company subsequently incurs will have no effect on the level of its assets.
- 15 The referring tribunal states that the individual undertakings to cover losses in the amount provisionally specified in that regard in the budget estimate or the business plan of Immobilien Linz, given to the latter before the beginning of each financial year, are enforceable by it in the courts. This is said to apply to the undertaking given by the mayor of the City of Linz on 21 December 2005.
- 16 In those circumstances, the Unabhängiger Finanzsenat, Außenstelle Linz (Independent Finance Tribunal, Linz District) decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the absorption of losses of a company by its sole member, a public authority whose representative was instructed by the competent body to grant an annual member’s contribution to cover losses in the amount provisionally specified in that regard prior to the beginning of the financial year in the budget estimate or business plan adopted by the company, increase the assets of that company within the meaning of Article 4(2)(b) of Directive 69/335/EEC ...?’

### **The question referred for a preliminary ruling**

- 17 By its question, the referring tribunal asks, essentially, whether it is only the absorption of a company’s losses by a member pursuant to a profit and loss transfer agreement concluded before those losses are sustained that does not increase the assets of that company for the purposes of Article 4(2)(b) of Directive 69/335, or whether this is also the case where the losses are absorbed pursuant to a prior undertaking given by the member, the sole purpose of which is to cover the company’s future losses.
- 18 It should be recalled at the outset that, pursuant to Article 4(2)(b) of Directive 69/335, services provided by a member which enable a capital company to increase its assets without entailing an increase in the company’s capital and which may increase the value of the company’s shares may be subject to capital duty.
- 19 Regarding the first condition, relating to the increase in assets, it should be recalled that, inasmuch as the assets of a company are defined as all the property which the members have contributed, together with any increase in its value, an increase in the assets includes, in principle, every kind of increase in the net assets of a capital company (Case C-46/04 *Aro Tubi Trafilerie* [2006] ECR I-3009, paragraph 34 and the case-law cited). The Court has thus held that the absorption of a company’s losses by one of its members constitutes a contribution that increases the assets of the company, since it restores the assets to the level which they had reached before the losses were sustained (*Siegen*, paragraph 13).
- 20 Regarding the second condition, relating to the increase in the value of the company’s shares, it should be observed that, inasmuch as the absorption of a company’s losses by one of its members restores the assets to the level which they had reached before the losses were sustained, that operation contributes to increasing the company’s economic potential. Such absorption must therefore be regarded as liable to increase the value of its shares for the purposes of Article 4(2)(b) of Directive 69/335 (see, to that effect, Case C-15/89 *Deltakabel* [1991] ECR I-241, paragraph 13, and Case C-249/89 *Trave-Schiffahrtsgesellschaft* [1991] ECR I-257, paragraph 13).
- 21 It follows that the absorption of a company’s losses by one of its members increases the company’s assets within the meaning of Article 4(2)(b) of Directive 69/335.
- 22 However, at paragraphs 13 and 14 of the judgment in *Siegen*, the Court held that, although the absorption by a member of losses incurred by a company must be regarded as a contribution that increases the company’s assets, the same is not true if those losses are absorbed pursuant to a profit and loss transfer agreement entered into before the losses were sustained, since that undertaking means that losses subsequently incurred by the company will have no effect on the level of the company’s assets.

- 23 It follows from the judgment in *Siegen* that the Court has recognised an exception where the member absorbs the losses pursuant to an undertaking entered into by him before those losses are sustained, since that undertaking means that losses subsequently incurred by the company will have no effect on the level of the company's assets. This interpretation of the judgment in *Siegen* is confirmed by Case C-392/00 *Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken* [2002] ECR I-7397, paragraph 21.
- 24 That exception is justified by the fact that, by virtue of the obligation accepted beforehand by its member, the company in whose favour such an undertaking is entered into will not be able to record a loss, whatever the results of its economic activity, since any losses will automatically be passed on to its member. Consequently, in the specific situation, such as that in the main proceedings, where such an undertaking has been given before the company records a loss, it is established that the results of the company's economic activity will not affect its economic potential.
- 25 In those circumstances, the charging of capital duty upon the absorption of the company's losses by a member is not justified, since there is no increase in the company's assets.
- 26 Therefore, the answer to the question referred is that Article 4(2)(b) of Directive 69/335 must be interpreted as meaning that the absorption by a member of a company's losses pursuant to an undertaking given by the member before the losses were sustained, the sole purpose of which was to cover such losses, does not increase the assets of that company.

### **Costs**

- 27 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring tribunal, the decision on costs is a matter for that tribunal. 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:

**Article 4(2)(b) 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 meaning that the absorption by a member of a company's losses pursuant to an undertaking given by the member before the losses were sustained, the sole purpose of which was to cover such losses, does not increase the assets of that company.**