

JUDGMENT OF THE COURT (Sixth Chamber)

27 October 1998

(Directive 69/335/EEC - Indirect taxes on the raising of capital - Duty on notarial deeds recording the repayment of debenture loans)

In Joined **Cases C-31/97 and C-32/97**,

REFERENCES to the Court under Article 177 of the EC Treaty by the Tribunal Superior de Justicia de Catalunya, Spain, for a preliminary ruling in the proceeding pending before that court between

**Fuerzas Eléctricas de Catalunya SA (FECSA) (C-31/97)**,

**Autopistas Concesionaria Española SA (C-32/97)**

and

**Departament d'Economía i Finances de la Generalitat de Catalunya,**

on the interpretation of Articles 11(b) and 12 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),

THE COURT (Sixth Chamber),

composed of: G. Hirsch, President of the Second Chamber, acting as President of the Sixth Chamber, G.F. Mancini, H. Ragnemalm (Rapporteur), R. Schintgen and K.M. Ioannou, Judges,

Advocate General: N. Fennelly,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Fuerzas Eléctricas de Catalunya SA (FECSA), by Leopoldo López-Aranday Domingo, of the Madrid Bar,
- Autopistas Concesionaria Española SA, by Francisco Bru Bonet, of the Barcelona Bar,
- the Departament d'Economía i Finances de la Generalitat de Catalunya, by Aureliano García Fernández, of the Legal Service of the Generalitat de Catalunya,
- the Spanish Government, by Paloma García Plaza, Abogado del Estado, of the State Legal Department, acting as Agent,

- the Commission of the European Communities, by Miguel Díaz-Llanos La Roche, Legal Adviser, Carlos Gómez de la Cruz and Hélène Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Fuerzas Eléctricas de Catalunya SA (FECSA), represented by Leopoldo López-Aranda y Domingo; of Autopistas Concesionaria Española SA, represented by Marta Casas Caba, of the Barcelona Bar; of the Departament d'Economía i Finances de la Generalitat de Catalunya, represented by Ramón Castellar i Morales, of the Legal Service of the Generalitat de Catalunya; of the Spanish Government, represented by Santiago Ortíz Vaamonde, Abogado del Estado, acting as Agent; and of the Commission, represented by Carlos Gómez de la Cruz, at the hearing on 7 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 11 June 1998,

gives the following

### **Judgment**

1. By orders of 3 and 9 December 1996, received at the Court on 23 January 1997, the Tribunal Superior de Justicia de Catalunya (High Court of Justice, Catalonia) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 11(b) and 12 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, hereinafter 'the Directive').
2. That question was raised in two sets of proceedings brought by Fuerzas Eléctricas de Catalunya SA (hereinafter 'FECSA') and Autopistas Concesionaria Española SA (hereinafter 'ACESA') against the Departament d'Economía i Finances de la Generalitat de Catalunya (Department of Economy and Finance of the Generalitat of Catalonia, hereinafter 'the tax authorities') concerning the payment of duty on notarial deeds recording the repayment of debenture loans.
3. By order of the President of the Court of 4 February 1997, the cases were joined for the purposes of the written procedure, the oral procedure and the judgment.
4. The Directive is aimed in particular at achieving harmonisation of the factors involved in the fixing and levying of capital duty in the Community, in the context of the elimination of tax obstacles which interfere with the free movement of capital.
5. Article 11 of the Directive provides that:  
'Member States shall not subject to any form of taxation whatsoever:  
...  
(b) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities.'

6. Article 12(1) of the Directive provides:  
'Notwithstanding Articles 10 and 11, Member States may charge:
  - (a) duties on the transfer of securities, whether charged at a flat rate or not;
  - (b) transfer duties, including land registration taxes, on the transfer, to a company, firm, association or legal person operating for profit, of businesses or immovable property situated within their territory;
  - (c) transfer duties on assets of any kind transferred to a company, firm, association or legal person operating for profit, in so far as such property is transferred for a consideration other than shares in the company;
  - (d) duties on the creation, registration or discharge of mortgages or other charges on land or other property;
  - (e) duties paid by way of fees or dues;
  - (f) value added tax.'
7. The Spanish tax system includes a duty on documented legal transactions governed by Royal Legislative Decree No 3050/80 of 30 December 1980, approving the consolidated version of the Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Law concerning duty on transfers of assets and documented legal transactions, hereinafter 'the Law'), and by Royal Decree No 3494/81 of 29 December 1981, approving its implementing regulation.
8. According to Article 1 of the Law, duty on transfers of assets and documented legal transactions is an indirect tax imposed on (1) transfers of assets for consideration, (2) internal company transactions and (3) documented legal transactions.
9. Under Article 28 of the Law, the duty applies to notarial records, deeds and certificates, subject to the conditions set out in Article 31. Article 31(2) provides that the first copies of notarial records and deeds, where they have as their subject-matter a quantity or a thing of ascertainable value and contain acts or contracts required to be entered in the Property, Commercial or Industrial Property Registers, are subject to duty at the rate of 0.5% for those acts or contracts.
10. Article 20 of the implementing regulation specifies that, while the redemption of debentures is not subject to the duty on transfers of assets, it is none the less subject to the duty on documented legal transactions, according to the loan capital in the case of simple debentures and the capital secured in other cases.
11. In Case C-31/97, FECSA partially redeemed an issue of debentures in an amount of PTA 378 650 000 by a notarial deed. The tax authorities made an assessment in respect of that transaction, in which, applying the rate of 0.5% to the amount of the debt extinguished, they calculated a liability to tax of PTA 1 893 250.
12. In Case C-32/97, ACESA repaid a debenture loan issued in 1971, also by a notarial deed. That repayment gave rise to the assessment, by the tax authorities, of a liability to tax of PTA 367 500 by way of duty on documented legal transactions.
13. FECSA and ACESA each challenged their assessments before the Tribunal Económico Administrativo Regional de Catalunya (Regional Court for Economic Administrative Affairs, Catalonia), which dismissed their applications. They then appealed to the Tribunal Superior de Justicia de Catalunya, claiming that the levying, under national

rules, of the duty on documented legal transactions on the repayment of debenture loans was contrary to the Directive.

14. Considering that the settlement of the disputes before it depended on an interpretation of the Directive, the national court decided to stay proceedings and refer the following question to the Court for a preliminary ruling:  
'Having regard to Articles 11(b) and 12 of Council Directive 69/335/EEC of 17 July 1969, is the purported levying by the Spanish Administration of the Duty on Transfers of Assets and Documented Legal Transactions on records of redemption (repayment of loans) in conformity with Community law, or on the contrary does it conflict with Community law with the result that it must be disallowed as being incompatible therewith?'
15. By its question, the national court seeks, in substance, to ascertain whether Article 11(b) of the Directive must be interpreted as meaning that the prohibition of taxation on debenture loans applies to the duty on notarial deeds recording the repayment of loans and, if so, whether such a duty is covered by the derogation provided for in particular in Article 12(1)(d) of the Directive.
16. The Kingdom of Spain and the tax authorities contend, first of all, that Article 11(b) of the Directive does not mention the repayment of loans among the transactions which cannot be subject to taxation.
17. In that respect, it must be remembered that Article 11(b) of the Directive prohibits taxation, of any form whatsoever, on loans raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities.
18. It is thus true that Article 11(b) of the Directive does not expressly mention the repayment of debenture loans; nevertheless, prohibiting the levying of duty when debenture loans are issued but authorising it when such loans are repaid would have the effect, contrary to the objective pursued by the Directive, of taxing loans as overall operations for raising capital.
19. It follows that Article 11(b) of the Directive must be interpreted as meaning that the prohibition of taxation on debenture loans extends to taxation on the repayment of such loans.
20. The tax authorities then contend that the Directive in no way applies to the notarial documents drawn up for the repayment of loans, when such deeds are an essential formal condition for other legal transactions, distinct from the issue of loans or their repayment, such as the entry on the Property or Commercial Register of the extinction of the loans entered on the said registers.
21. Here, it must be remembered that Article 11(b) of the Directive prohibits not only taxation on debenture loans, but also on any formalities relating thereto.
22. It is therefore sufficient to state that, even if the duty at issue in the main proceedings is not chargeable on the repayment of loans as such, it is none the less levied on the

notarial deeds which are obligatory to have the repayment registered, that is to say in respect of formalities relating thereto.

23. The tax authorities contend, finally, that the duty at issue in the main proceedings may at least be levied in so far as it concerns loans secured by mortgages.
24. On that point, it must be recognised that the Member States remain free, in accordance with Article 12(1)(d) of the Directive, to levy duties on the discharge of mortgages or other charges on land or other property. However, the repayment of a debenture loan constitutes a discrete financial transaction, separate from the discharge of a mortgage registered in order to secure the debentures resulting from the loan.
25. It follows that, even if a debenture loan is secured by a mortgage, the repayment of the loan cannot be subject to taxation.
26. In the light of the foregoing, the answer to the national court's question must be that Article 11(b) of the Directive must be interpreted as meaning that the prohibition of taxation on debenture loans applies to the duty on notarial deeds recording the repayment of loans. Such a duty cannot come within the derogation provided for in Article 12(1)(d) of the Directive.

#### **Costs**

27. The costs incurred by the Spanish Government and by the Commission, 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 actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Tribunal Superior de Justicia de Catalunya by orders of 3 and 9 December 1996, hereby rules:

**Article 11(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as meaning that the prohibition of taxation on debenture loans applies to the duty on notarial deeds recording the repayment of loans. Such a duty cannot come within the derogation provided for in Article 12(1)(d) of the said directive.**