ORDER OF THE COURT (Eighth Chamber)

6 October 2010 *

In Case C-487/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 24 September 2009, received at the Court on 30 November 2009, in the proceedings

Inmogolf SA

v

Dirección General de Tributos de la Consejería de Economía y Hacienda de la Comunidad Autónoma de Murcia,

THE COURT (Eighth Chamber),

composed of C. Toader, President of the Chamber, L. Bay Larsen and A. Prechal (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

* Language of the case: Spanish.

the Court having proposed to rule by means of a reasoned order in accordance with the first subparagraph of Article 104(3) of the Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Article 11(a) and Article 12(1)(a) 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 directive').

2 The reference has been made in proceedings between Inmogolf SA ('Inmogolf') and the Dirección General de Tributos de la Consejería de Economía y Hacienda de la Comunidad Autónoma de Murcia (Directorate-General for Taxation of the Department of Economic Affairs and Finance of the Autonomous Community of Murcia) concerning the repayment of tax on capital transfers and documented legal acts.

Legal context

European Union legislation

3 Article 11 of the directive provides:

‘Member States shall not subject to any form of taxation whatsoever:

(a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued;

…’

4 Under Article 12(1)(a) of the directive:

‘1. Notwithstanding Articles 10 and 11, Member States may charge:

(a) duties on the transfer of securities, whether charged at a flat rate or not;

…’

National legislation

5 Law 24/1988 of 28 July 1988 on stock markets (BOE No 181 of 29 July 1988, p. 23405), as amended by Law 18/91 of 6 June 1991 (BOE No 136 of 7 June 1991, p. 18665) (‘Law 24/1988’), provides in Article 108 thereof:

‘1. The transfer of securities, whether or not negotiable on an official secondary market, shall be exempt from tax on capital transfers and documented legal acts and from value added tax.

2. The following are excluded from the provisions of the previous paragraph and, as "[t]ransfer of assets for consideration", shall be subject to tax on capital transfers and documented legal acts:

(1) Transfers made on the secondary market, and also acquisitions made on the primary market as a consequence of the exercise of preferential subscription rights and of the right to convert debentures into shares, of securities which represent a portion of the share capital or assets of companies, funds, associations or other entities at least 50 % of the assets of which comprise immovable property situated in national territory, provided that, as a result of that transfer or acquisition, the purchaser obtains full ownership of those assets or, at least, is in a position which enables it to exercise control over those entities.

Control over commercial companies will be deemed to have been obtained when a shareholding of more than 50 % has been acquired, whether directly or indirectly.

For the purposes of calculating 50 % of the assets comprising immovable property, account will not be taken of those immovable assets, except building plots and sites, which form part of the operating assets of entities whose sole company object consists in the exercise of business activities of property construction or development.

(2) Transfers of company shares or shareholdings, received for contributions of immovable assets made on the occasion of the incorporation of companies or the increase in their capital, provided that between the date of contribution and the date of transfer a period of one year has not elapsed.

In the above cases, the rate for transfers of immovable assets for consideration will be applied to the value of the aforementioned assets calculated in accordance with the rules contained in the current regulations governing the tax on capital transfers and documented legal acts.'

6 According to the national court, Article 108(2) of Law 24/1988 is designed to avoid a possible circumvention of tax on capital transfers for transfers of immovable assets concealed within a direct acquisition of securities.

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

7 By authentic instrument of 20 August 1993, Inmogolf, a shareholder in Inmobiliaria La Manga SA, acquired 49 shares in that company from another shareholder for the price of ESP 49 000, thus acquiring a shareholding in excess of 50 % of the share capital of that company.

8 On 22 April 1997, the authentic instrument was lodged at the Servicio Territorial de Cartagena (Cartagena Regional Department) of the Dirección General de Tributos de la Consejería de Economía y Hacienda de la Comunidad Autónoma de Murcia, along with a self-assessment for the tax on capital transfers and documented legal acts. That instrument declared a taxable amount of ESP 972 999 989, corresponding to the total value of the immovable assets of Inmobiliaria La Manga SA, and an amount of tax to be paid of ESP 58 378 799, although it stated that this was given as a precautionary measure, given that the transfer was exempt from tax in accordance with Article 108(1) of Law 24/1988.

9 On 31 December 1997, Inmogolf applied for a final statement of tax due and a refund of the amount paid, claiming application of the exemption provided for in Article 108(1) of Law 24/1988. That application was refused by a decision of the Dirección General de Tributos de la Consejería de Economía y Hacienda de la Comunidad Autónoma de Murcia of 17 April 1998. By a decision of 30 April 1998, that administration issued an additional statement of tax due, in the amount of ESP 28 910 297, as interest for late payment.

10 As the objections to those decisions had been dismissed, as were, subsequently, the actions against the dismissal of those objections, Inmogolf eventually brought an appeal before the national court, in which it alleged an infringement of Article 11(a) and Article 12 of the directive.

11 Since it considered that resolving the dispute before it required an interpretation of the directive, the Tribunal Supremo (Supreme Court, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Having regard to the fact that Article 11(a) of the [directive] prohibited the taxation of making available on the market or dealing in stocks, shares or other securities of the same type, and Article 12(1)(a) thereof only authorised Member States to charge duties on the transfer of securities, whether charged at a flat rate or not, and in the light of the fact that Article 108 of Law 24/1988 … nevertheless establishes a general exemption, from value added tax and from tax on capital transfers, for the transfer of securities, but subjects these transactions to tax on capital transfers, as transfers of assets for consideration, provided that they represent part of the capital of companies in which at least 50 % of the assets comprise immovable property and where the purchaser, as a result of that transfer, obtains a position which enables [it] to exercise control over the entity, without distinguishing between holding companies and companies which carry on an economic activity, does [the directive] preclude the automatic application of legislation

of Member States, such as Article 108(2) of Law 24/1988 …, which taxes certain transfers of securities which conceal transfers of immovable assets, even if there has been no intention to avoid taxation?

(2) If it is not necessary for there to be an intention to avoid taxation, does [the directive] preclude legislation such as Law … 24/1988, which establishes a charge on the acquisition of major shareholdings in companies whose assets comprise mainly immovable property, even though those companies are fully operative and the immovable assets cannot be dissociated from their economic activities?'

Consideration of the questions referred

12 Under the first subparagraph of Article 104(3) of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may give its decision by reasoned order.

13 The Court considers that that is so in the present case.

14 By its questions, which it is appropriate to deal with together, the national court asks, in essence, if the directive and, more particularly, Article 11(a) and Article 12(1)(a) thereof, preclude legislation of a Member State, such as provided in Article 108(2) of Law 24/1988, which, in order to prevent tax avoidance in the context of the transfer of immovable assets by companies, subjects transfers of securities to tax on capital

transfers where those transfers of shares represent shares in the share capital of companies the assets of which are at least 50 % composed of immovable property and where the purchaser has following such a transfer a position which allows it to exercise control over the entity at issue, even in cases where, firstly, there was no intention to avoid tax and where, secondly, those companies are fully operational and the immovable properties cannot be dissociated from the economic activity carried out by those companies.

15 In this regard, it must be recalled that Article 11(a) and Article 12(1)(a) of the directive establish a clear distinction between an issue of securities, which cannot be subjected to any charge or tax other than provided for by law, and the transfer of such securities, which, by contrast, may be subjected to such a tax or duty (see, to that effect, Case C-569/07 *HSBC Holdings and Vidacos Nominees* [2009] ECR I-9047, paragraph 34).

16 In relation to, firstly, Article 11(a) of the directive, it is not clear from the documents submitted to the Court whether a tax such as the one in issue in the main proceedings is charged on the issue of securities, such as referred to in that provision. It is not therefore to be considered as prohibiting such a tax.

17 Next in relation to the question of whether legislation such as that at issue in the main proceedings establishes a duty within the meaning of Article 12(1)(a) of the directive, it is admittedly true, as observed, in essence, by the Spanish and Hungarian Governments, that, from an economic point of view, a tax such as the one at issue in the main proceedings could be considered as applying, in actual fact, to the immovable property underlying the securities. However, as is clear from the documents submitted to the Court and as is also noted by the European Commission, the event giving rise to such a charge is the transfer of securities. Since the event giving rise to a tax such as the one at issue in the main proceedings is the occurrence of a specific transaction that is referred to in Article 12(1)(a) of the directive, it must be considered that such

a tax falls within that provision (see, to that effect, Case C-22/03 *Optiver and Others* [2005] ECR I-1839, paragraph 32).

18 On the subject of Article 12(1)(a) of the directive, the Court has already ruled that that provision allows Member States to impose a duty on the transfer of securities, independently of the question of whether the company issuing those securities is listed on a stock exchange and of whether those securities are transferred on the stock exchange or directly from the transferor to the transferee (Case C-193/04 *Organon Portuguesa* [2006] ECR I-7271, paragraph 21 and case-law cited). Furthermore, that provision allows Member States to freely determine the rate of the taxes to which that provision refers (*Organon Portuguesa*, paragraph 24).

19 It must also be held, as was correctly observed by the Spanish, Hungarian and Netherlands Governments as well as by the Commission, that Article 12(1)(a) of the directive does not preclude a tax with the same characteristics as the one at issue in the main proceedings. That interpretation is confirmed both by the wording of that provision, which does not specify the conditions in which Member States may impose duties on the transfer of securities, and by the fact that the directive provided for complete harmonisation of the cases in which the Member States may levy indirect taxes on the raising of capital (*HSBC Holdings and Vidacos Nominees*, paragraph 25). As specifically shown by Article 12(1)(a) of the directive, a transfer of securities, such as referred to in that provision, does not, in itself, amount to a capital-raising transaction, which the legislator of the European Union intended to subject to European Union legislation in adopting the directive.

20 Finally, even if, therefore, Article 12(1)(a) of the directive does not preclude, in itself, a tax such as the one at issue in the main proceedings, it must nevertheless be added that, as correctly observed by the Commission, Member States must respect the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union (TFEU) when exercising the powers laid down in that provision (see, to that effect, inter alia, Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 18 and case-law cited). However, since the reference for a preliminary ruling is not concerned with the interpretation of fundamental freedoms and the decision of the national court, moreover, does not contain information concerning a possible application of the rules in which those freedoms are enshrined to a situation such as the one at issue in the main proceedings, it does not fall to the Court to rule on an interpretation of those freedoms in the context of this reference.

21 Consequently, the response to the questions referred is that the directive and, more particularly, Article 11(a) and Article 12(1)(a) thereof, does not preclude legislation of a Member State, such as provided in Article 108(2) of Law 24/1988, which, in order to prevent tax avoidance in the context of the transfer of immovable assets by companies, subjects transfers of securities to tax on capital transfers where those transfers of shares represent shares in the share capital of companies the assets of which are at least 50 % composed of immovable property and where the purchaser has following such a transfer a position which allows it to exercise control over the entity at issue, even in cases where, firstly, there was no intention to avoid tax and where, secondly, those companies are fully operational and the immovable properties cannot be dissociated from the economic activity carried out by those companies.

Costs

22 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 (Eighth Chamber) hereby orders:

Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, and, more particularly, Article 11(a) and Article 12(1)(a) thereof, does not preclude legislation of a Member State, such as provided in Article 108(2) of Law 24/1988 of 28 July 1988 on stock markets, as amended by Law 18/91 of 6 June 1991, which, in order to prevent tax avoidance in the context of the transfer of immovable assets by companies, subjects transfers of securities to tax on capital transfers where those transfers of shares represent shares in the share capital of companies the assets of which are at least 50 % composed of immovable property and where the purchaser has following such a transfer a position which allows it to exercise control over the entity at issue, even in cases where, firstly, there was no intention to avoid tax and where, secondly, those companies are fully operational and the immovable properties cannot be dissociated from the economic activity carried out by those companies.

[Signatures]