JUDGMENT OF THE COURT (First Chamber)

30 March 2006 *

In Case C-46/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte Suprema di Cassazione (Italy), made by decision of 6 November 2003, received at the Court on 6 February 2004, in the proceedings

Aro Tubi Trafilerie SpA

v

Ministero dell'Economia e delle Finanze,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, N. Colneric, J.N. Cunha Rodrigues and E. Levits, Judges,

* Language of the case: Italian.

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Aro Tubi Trafilerie SpA, by G. Bianco, avvocato,

— the Italian Government, by I.M. Braguglia and G. De Bellis, acting as Agent,

— the Commission of the European Communities, by R. Lyal and M. Velardo, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

1 The reference for a preliminary ruling relates, essentially, to the interpretation of Articles 4, 7 and 10 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 Directives 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15) and 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23; 'Directive 69/335').

2 This reference was made in the context of a dispute between Aro Tubi Trafilerie SpA ('Aro Tubi', as 'the acquiring company') and Ministero dell'Economia e delle Finanze concerning registration duty charged as a result of a double merger by which Aro Tubi acquired, first, its subsidiary Aro Tubi Estrusi and Profilati SpA ('Aro Tubi Estrusi', as 'the company acquired') and, second, its parent company Fratelli Gaggini SpA ('Fratelli Gaggini', as 'the company acquired').

Legal context

Community law

3 As is apparent from the first and second recitals in the preamble thereto, Directive 69/335 aims to encourage the free movement of capital which is regarded as essential for the creation of an internal market. In that regard, it seeks to eliminate tax barriers in the field of raising capital, in particular, in relation to contributions of capital to capital companies.

4 For that purpose, Articles 1 to 9 of Directive 69/335 provide for the charging of harmonised duty on contributions of capital to capital companies ('capital duty').

5 Article 4 of Directive 69/335 sets out the transactions which the Member States may or must, as the case may be, subject to capital duty ('contributions of capital to capital companies').

6 Thus, Article 4(1)(c) of the directive states that the Member States are to subject to capital duty 'an increase in the capital of a capital company by contribution of assets of any kind'.

7 Under Article 4(2)(b) of the directive, the Member States may subject to capital duty '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'.

8 Article 7 of Directive 69/335 fixes the rates of capital duty.

9 In relation to mergers, Article 7(1) of Directive 69/335 provided, in its original version and in certain circumstances, for a reduced rate:

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

...

(b) [the] 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 ...,

— the companies taking part in the transaction have their effective centre of management or their registered office within the territory of a Member State;

...'

10 The rate thus fixed has been amended on two occasions.

11 First, Article 2 of Directive 73/80 provided that 'the reduced rates provided for in Article 7(1)(b) ... of ... Directive [69/335] shall, with effect from 1 January 1976, be any rate between 0% and 0.50%'.

12 Next, Article 1(2) of Directive 85/303, applicable as at 1 January 1986, stated that Article 7(1) of Directive 69/335 was replaced by the following:

'Member States shall exempt from capital duty transactions, other than those referred to in Article 9, 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.

...'

13 Consequently, Article 7(1) of Directive 69/335 now provides, after those amendments, for an exemption from capital duty if three conditions are met, namely (i) the transfer of all the assets and liabilities of a capital company, or one or more parts of its business, to one or more capital companies which are in the process of being formed or which are already in existence, (ii) the consideration consists exclusively of the allocation of shares, and (iii) the effective centre of management or the registered office of the companies taking part in the transaction is within the territory of a Member State. For such mergers, the rate of capital duty has thus been reduced, over the years, to zero.

14 In addition, Article 10 of Directive 69/335, read in the light of the final recital in the preamble thereto, provides for the abolition of taxes with the same characteristics as capital duty ('taxes akin to capital duty').

National law

15 Under Article 1 of Decree No 131/1986 of the President of the Republic of 26 April 1986 (Ordinary Supplement to GURI No 99 of 30 April 1986), in the version applicable at the material time, 'registration duty applies ... to transactions which must be registered and to those which may be registered voluntarily'.

16 Under Article 2(a) of Decree No 131/1986, in conformity with the following articles, the acts indicated in the tariff must be registered if they were constituted in writing in the territory of the State.

17 In that regard, the first paragraph of Article 4(b) of the first part of that tariff provides that mergers between companies are subject to a proportional registration duty of 1%.

The main proceedings and the question referred

18 Aro Tubi is a company limited by shares incorporated under Italian law, its entire share capital being held by another company limited by shares incorporated under Italian law, Fratelli Gaggini. Aro Tubi held, for its part, the entire capital of a third company limited by shares incorporated under Italian law, Aro Tubi Estrusi.

19 By transaction of 19 December 1995, Aro Tubi acquired by merger its subsidiary Aro Tubi Estrusi (a 'non-proper' merger).

20 By that same transaction, Aro Tubi also acquired its parent company Fratelli Gaggini (a 'reverse' merger). Aro Tubi thus acquired the assets and liabilities of Fratelli Gaggini which included, inter alia, buildings, patents and trade marks. In return, all of Aro Tubi's shares were transferred to Fratelli Gaggini's shareholders.

21 Upon those two mergers, Aro Tubi had to pay, on 2 January 1996, registration duty equal to 1% of the assets and liabilities of the two companies which it acquired, namely Aro Tubi Estrusi and Fratelli Gaggini, which amounted to a total of ITL 54 761 000.

22 By application of 29 July 1996, Aro Tubi sought reimbursement from the Ufficio Atti Pubblici di Milano (Office for Registration of Public Documents, Milan) of the registration duty which it had paid. In response to the tacit refusal of its application by the tax authorities, Aro Tubi brought an action challenging the justification for that tax. That action was initially upheld by the Commissione Tributaria Provinciale di Milano (Provincial Tax Court, Milan), but subsequently dismissed by the Commissione Tributaria della Lombardia (Regional Tax Court, Lombardy) on appeal from the Amministrazione Finanziaria dello Stato (State Tax Authority). Aro Tubi thus brought an appeal on a point of law against the appeal decision.

23 Doubting the compatibility with Community law of the Italian legislation which provides for payment of registration duty in the case of a 'reverse' merger, namely a merger by means of acquisition where all of the shares of the acquiring company are held by the company acquired, the Corte Suprema di Cassazione (Supreme Court of Cassation) decided to stay the proceedings pending before it and to make a reference to the Court of Justice on the question whether Directive 69/335 precludes such legislation.

The question

24 By its question, the national court is essentially asking whether, in circumstances such as those at issue in the main proceedings, Directive 69/335 precludes the charging of a proportional registration duty of 1% of the value of the transaction in the case of a 'reverse' merger, namely a merger by means of acquisition where all of the shares in the acquiring company are held by the company acquired.

25 For that purpose, it is necessary to examine, at the outset, whether the registration duty at issue in the main proceedings has the characteristics of 'capital duty' as provided for in Articles 1 to 9 of Directive 69/335 or whether it must be classified as a 'tax akin to capital duty' for the purposes of Article 10 of that directive.

26 In that regard, it is settled case-law that the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law (Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, paragraph 39).

27 As regards, as in the present case, proportional duty of 1% on the value of contributions of capital to capital companies, it must be found that the event giving rise to such duty is the contribution itself and not some other transaction or preliminary formality, so that such duty must, in principle, be classified as 'capital duty' and not a 'tax akin to capital duty' for the purposes of Directive 69/335 (see, to that effect, *Bautiaa and Société française maritime*, paragraph 40).

28 It is thus apparent that the lawfulness of the duty in dispute in the main proceedings must be examined in the light of Articles 1 to 9 of Directive 69/335.

29 It must, first, be recalled that the transactions which are, or may be, subjected by the Member States to capital duty are laid down in Article 4 of Directive 69/335 (see, to that effect, in particular Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 12; *Bautiaa and Société française maritime*, paragraphs 31 and 32; and Case C-152/97 *Agas* [1998] ECR I-6553, paragraphs 19 and 20).

30 The transaction in question in the main proceedings constitutes a merger by acquisition. Such a merger could, in principle, be analysed in the light of either Article 4(1)(c) of Directive 69/335 or Article 4(2)(b) thereof.

31 Thus, Article 4(1)(c) of Directive 69/335 provides for the charging of capital duty in respect of an increase in the capital of a capital company by contribution of assets of any kind.

32 Article 4(2)(b) of the directive states that the Member States may subject to capital duty 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.

33 A comparison of those two provisions prompts the finding that the 'increase in the capital' referred to in Article 4(1)(c) of Directive 69/335 entails a formal increase in a company's capital by means of either an issue of new shares or an increase in the nominal value of the existing shares (see, to that effect, Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771, paragraph 15, and Case C-494/03 *Senior Engineering Investments* [2006] I-525, paragraph 33).

34 On the other hand, and inasmuch as the 'assets of the company' are defined as all the property which the members have contributed, together with any increase in its value (see, to that effect, Case C-38/88 *Siegen* [1990] ECR I-1447, paragraph 12), the 'increase in the assets' within the meaning of Article 4(2)(b) of Directive 69/335 includes, in principle, every kind of increase in the net assets of a capital company (*Senior Engineering Investments*, paragraph 34). Thus, the Court has classified as an 'increase in the assets' within the meaning of that provision, for example, a transfer

of profits (see Case C-49/91 *Weber Haus* [1992] ECR I-5207, paragraph 10), an interest-free loan (see, in particular, Case C-392/00 *Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken* [2002] ECR I-7397, paragraph 18), an absorption of losses (see *Siegen*, paragraph 13), and the waiver of a claim (Case C-15/89 *Deltakabel* [1991] ECR I-241, paragraph 12).

35 In the main proceedings there is no dispute that the merger in question did not give rise to an 'increase in the capital' of the acquiring company (Aro Tubi). That merger can thus not fall within Article 4(1)(c) of Directive 69/335.

36 It does, however, fall within the scope of Article 4(2)(b) of the directive.

37 First, it is apparent from the merger document that the company acquired (Fratelli Gaggini) was not over-indebted and that it held not only shares in the acquiring company (Aro Tubi), but also other assets, such as buildings, patents and trade marks, inter alia. At the time of the merger those assets were transferred to the acquiring company (Aro Tubi). That merger therefore 'increased the assets' of the latter company.

38 Secondly, in the light of that increase in the assets of the company, the merger in question in the main proceedings 'may [have increased] the value of the shares' in the acquiring company (Aro Tubi). As a result of that merger, the shares in that company are, de facto, worth more.

39 Thirdly, the merger in question takes the form of a 'provision of services by a member' within the meaning of Article 4(2)(b) of Directive 69/335.

40 It follows that the merger in question in the main proceedings constitutes a contribution of capital to a capital company as covered by Article 4(2)(b) of Directive 69/335 which may, in principle, be subjected to capital duty.

41 However, Article 7(1) of Directive 69/335 exonerates from capital duty certain transactions which were taxed, as at 1 July 1984, at a rate of 0.50% or less.

42 It is apparent from the previous versions of that provision (set out in paragraphs 9 and 11 of this judgment) that, on that latter date, namely 1 July 1984, mergers were taxed at a rate of 0% to 0.5% if they met three conditions, namely (i) the transfer of all the assets and liabilities of a capital company, or one or more parts of its business, to one or more capital companies which are in the process of being formed or which are already in existence, (ii) the consideration consists exclusively of the allocation of shares, and (iii) the effective centre of management or the registered office of the companies taking part in the transaction is within the territory of a Member State.

43 As regards the merger in question in the main proceedings, it must be noted, first, that a capital company, Fratelli Gaggini, transferred all of its assets and liabilities to another capital company which was already in existence, Aro Tubi.

44 Secondly, the consideration for that capital consisted exclusively of the allocation of shares in the acquiring company (Aro Tubi). The own shares which Aro Tubi acquired with the assets and liabilities of Fratelli Gaggini were then (re)allocated to the members of Fratelli Gaggini.

45 Thirdly, the two companies involved, Aro Tubi and Fratelli Gaggini, both have their registered office in Italy.

46 Consequently, the merger in question in the main proceedings falls within Article 7 (1) of Directive 69/335. It is therefore exempt and cannot be taxed by way of capital duty.

47 In the light of the above, the answer to the question referred must be that, in circumstances such as those at issue in the main proceedings, Directive 69/335 precludes the charging of a proportional registration duty of 1% of the value of the transaction in the case of a 'reverse' merger, namely a merger by means of acquisition where all of the shares in the acquiring company are held by the company acquired.

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:

In circumstances such as those at issue in the main proceedings, Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directives 73/80/EEC of 9 April 1973 fixing common rates of capital duty and 85/303/EEC of 10 June 1985, precludes the charging of a proportional registration duty of 1% of the value of the transaction in the case of a 'reverse' merger, namely a merger by means of acquisition where all of the shares in the acquiring company are held by the company acquired.

[Signatures]