JUDGMENT OF THE COURT (Sixth Chamber)
17 October 2002 *

In Case C-138/00,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Solida Raiffeisen Immobilien Leasing GmbH,

Tech Gate Vienna Wissenschafts- und Technologiepark GmbH

and

Finanzlandesdirektion für Wien, Niederösterreich und Burgenland,

on the interpretation of Article 5(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), as amended by the Act concerning the

* Language of the case: German.

conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— Solida Raiffeisen Immobilien Leasing GmbH, by W.-D. Arnold, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Solida Raiffeisen Immobilien Leasing GmbH, represented by W.-D. Arnold, of the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland, represented by H. Bavenek-Weber, acting as Agent, of the Austrian Government, represented by H. Dossi, and of the Commission, represented by K. Gross, at the hearing on 26 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2002,

gives the following

Judgment

1 By order of 30 March 2000, received at the Court on 10 April 2000, the Verwaltungsgerichtshof (Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 5(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), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1).

2 That question was raised in the course of two sets of proceedings between, first, Solida Raiffeisen Immobilien Leasing GmbH (hereinafter 'Solida') and, second, Tech Gate Vienna Wissenschafts- und Technologiepark GmbH (hereinafter

'Tech') and the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Revenue administration for the *Länder* of Vienna, Lower Austria and Burgenland, hereinafter 'the Finanzlandesdirektion') concerning the levy of capital duty upon the acquisition of dividend certificates by a non-member of the capital company which issued them.

Relevant provisions

Community legislation

3 As is apparent from the first recital in its preamble, the aim of Directive 69/335 is to promote the free movement of capital, which is considered to be one of the essential conditions for achieving an economic union whose characteristics are similar to those of a domestic market.

4 According to the sixth recital in the preamble to Directive 69/335 the pursuit of such an objective presupposes, as regards duty on the raising of capital, the abolition of the indirect taxes then in force in the Member States and the application instead of a single tax charged only once in the common market at a level which is the same in all the Member States.

5 Under Article 4(1) of Directive 69/335:

'The following transactions shall be subject to capital duty:

...

(c) an increase in the capital of a capital company by contribution of assets of any kind;

(d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;

...'.

6 Article 5(1) of Directive 69/335 is worded as follows:

'1. The duty shall be charged:

(a) in the case of formation of a capital company or of an increase in its capital or assets, as referred to in Article 4(1)(a), (c) and (d): on the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution. Member States may postpone the charging of capital duty until the contributions have been effected;

...

(d) in the case of an increase in the assets, as referred to in Article 4(2)(b): on the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services;

...'.

Austrian legislation

7 Under Paragraph 2(1), point 1, of the Kapitalverkehrsteuergesetz (Law on capital transfer tax) of 16 October 1934 (DRGBl. 1934/1058, in its amended version as published in BGBl. 1995/21, hereinafter 'the KVG'), 'the acquisition by the first acquirer of rights in a domestic capital company' is subject to capital duty.

8 Under Paragraph 5, point 1, of the KVG, dividend rights are deemed to be rights in a company. Under point 2 of that provision, owners of dividend rights are treated as members of the capital company which issued those rights.

9 Under Paragraph 7(1)(a) of the KVG the basis of assessment on the acquisition of rights in a company, and therefore also on the acquisition of dividend certificates, is made up of the value of the consideration, which also includes the costs of the company formation or increase in capital which are assumed by the members, but not the capital duty to be paid in respect of the acquisition of the rights in the company.

The main proceedings and the question referred

The Solida case

10 On 10 March 1995, Solida issued dividend certificates for a total nominal value of ATS 465 000. Those certificates, which were acquired by Pelias Raiffeisen

Immobilien Leasing GmbH (hereinafter 'Pelias'), represented an entitlement to a share in Solida's current profits, in its assets, in the value of its business, including all its secret reserves and goodwill, as well as in any surplus upon the liquidation of that company.

11 As is apparent from the order for reference, those dividend certificates also entitled their holder to repayment of the nominal value plus any additional payments made. That claim ranked equally with those of the company's other creditors, but none the less took priority over the claims of members for repayment of contributions on the basis of the company's statutes. In the event of termination of the dividend rights by notice, certificate holders were entitled to receive a sum equal to their share in Solida's value at the time of termination, which sum was not to be less than the nominal value of their dividend certificates plus any additional payments made.

12 On 24 March 1995, the parent company of Pelias, Raiffeisen Landesbank Tirol reg. Gen. mbH (hereinafter 'RLB'), paid a 'parent company contribution' ('Großmutterszuschuss') of ATS 92 565 000 to Solida.

13 By decision of 29 January 1997, the Finanzamt für Gebühren und Verkehrsteuern (tax office for fees and transaction tax, hereinafter 'the Finanzamt') assessed the capital duty payable by Solida using the amount of ATS 93 030 000 as the basis of assessment.

14 Solida appealed against that decision to the Finanzlandesdirektion claiming that, under Directive 69/335, payments made by non-members are not subject to capital duty.

15 The Finanzlandesdirektion dismissed that appeal on the ground, first, that in the case of dividend rights, it is not the payment by a member which gives rise to tax liability, but the acquisition of rights in the company and, second, that the additional payment made by RLB is, if rights in Solida are terminated, to revert to the holder of the dividend certificates, namely Pelias.

16 Solida challenged that decision before the Verwaltungsgerichtshof. In support of its action, it argued in particular that, having regard to Article 5(1)(a) of Directive 69/335, the acquisition of dividend certificates by a non-member cannot be subject to capital duty.

The Tech case

17 In June 1998, Tech issued dividend certificates for a total nominal value of ATS 2 000 000. Those certificates were acquired by Wirtschaftsparkentwicklungs GmbH. The rights attached to those certificates corresponded, essentially, to the rights conferred by the dividend certificates mentioned in the Solida case. However, it is apparent from the order for reference that the entitlement of the dividend certificate holders to a share of the current profits was to be calculated in accordance with the proportion between, on the one hand, the total nominal value of those certificates plus any additional payments made, irrespective of the identity of the source of such payments, and, on the other, the sum of the total share capital paid into the company, including additional payments, and the total nominal value of other dividend certificates issued plus any additional payments made.

18 By notice of assessment of 15 October 1998, the Finanzamt raised an assessment on that transaction using the sum of ATS 2 000 000 as the basis of assessment.

19 On 12 October 1998, Tech issued a second series of dividend certificates with a total nominal value of ATS 1 000 000. Those certificates were acquired by Wiener Hafen GmbH. In the notice of assessment relating to that transaction, the Finanzamt took the amount of ATS 1 000 000 as the basis of assessment.

20 On 18 June 1999, Tech informed the Finanzamt that additional payments relating to the dividend rights of Wirtschaftsparkentwicklungs GmbH and Wiener Hafen GmbH, amounting respectively to ATS 68 000 000 and ATS 69 000 000, had been made on 6 August and 12 October 1998.

21 Since it considered that those additional payments formed part of the consideration for the acquisition of the dividend certificates, the Finanzlandesdirektion annulled both the notices of assessment mentioned in paragraphs 18 and 19 of this judgment.

22 Tech challenged that decision before the Verwaltungsgerichtshof claiming that Articles 4 and 5 of Directive 69/335 preclude the levy of capital duty on payments made by non-members.

23 In those circumstances the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do payments which a non-member of a capital company makes to the company for the acquisition of dividend rights constitute "assets of any kind contributed or to be contributed by the members" within the meaning of Article 5(1)(a) of... Directive 69/335...?'

The question referred

24 By its question the referring court is asking, in essence, whether Article 5(1)(a) of Directive 69/335 is to be interpreted as meaning that the expression 'assets of any kind contributed or to be contributed by the members' used therein covers payments made to a capital company, which is increasing its assets by the issue of dividend certificates, by a non-member of that company which wishes to acquire such certificates.

25 With a view to replying to the question thus reformulated, it is appropriate, in the first place, to determine whether the issue by a capital company of dividend certificates such as those in issue in the main proceedings comes within the scope of Directive 69/335.

26 In that regard, it should be recalled that, in accordance with Article 4(1)(d) of Directive 69/335, an increase in the assets of a capital company by contribution of assets of any kind, in consideration of rights of the same kind as those of members, is to be subject to capital duty. Such rights include, in particular, voting rights, a share in the profits or a share in the surplus upon liquidation of the company concerned.

27 First, the consideration paid for the acquisition of the dividend certificates in issue in the main proceedings had the effect of increasing the assets of the company which received it. Second, as is apparent from the order for reference, those dividend certificates entitle their holder to a share in the current profits of the issuing company and in any surplus upon its liquidation.

28 In those circumstances, the issue by a capital company of dividend certificates such as those in issue in the main proceedings comes, as a rule, within the scope of Article 4(1)(d) of Directive 69/335.

29 It is necessary, in the second place, to consider whether, as Solida claims, the fact that the acquirer of the dividend certificates is not a member of the issuing company is such as to affect the interpretation contained in the preceding paragraph.

30 In that regard, it is appropriate to point out that Article 5(1)(a) of Directive 69/335 admittedly provides that, for the transactions it covers, which include those within the scope of Article 4(1)(d) of that directive, capital duty is to be charged on the actual value of assets of any kind contributed 'by the members'.

31 However, first, it must be said that the limitation of the scope of Article 4(1)(d) of Directive 69/335, which follows from Solida's suggested interpretation of Article 5(1)(a) of that directive, has, apart from the wording of the latter provision, no basis in Directive 69/335.

32 It is clear from the wording of Article 4(2)(b) of Directive 69/335 that, when the Community legislature intended to limit the scope of a provision of that directive specifying the chargeable event for capital duty to transactions carried out by members of the capital company receiving the contributions, it did so clearly by referring to members expressly.

33 However, since Article 4(1)(d) of Directive 69/335 does not provide that the contributions which it covers must come from a member of the company receiving them, an interpretation of a provision of that directive which would have the effect of reducing the scope of that article as if it contained such a condition cannot be accepted.

34 Second, having regard to the scheme of Directive 69/335, the wording of Article 4 thereof, concerning its material scope, must prevail over that of Article 5, relating to the basis of assessment of capital duty, where it is a matter of deciding the conditions which a transaction has to satisfy in order to come within the scope of that directive.

35 In those circumstances, the answer to the question referred must be that Article 5(1)(a) of Directive 69/335 is to be interpreted as meaning that the expression 'assets of any kind contributed or to be contributed by the members' used therein covers payments made to a capital company, which is increasing its assets by the issue of dividend certificates, by a non-member of that company which wishes to acquire such certificates.

Costs

36 The costs incurred by the Austrian 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 proceedings 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 Verwaltungsgerichtshof by order of 30 March 2000, hereby rules:

Article 5(1)(a) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, is to be interpreted as meaning that the expression 'assets of any kind contributed or to be contributed by the members' used therein covers payments made to a capital company, which is increasing its assets by the issue of dividend certificates, by a non-member of that company which wishes to acquire such certificates.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 17 October 2002.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber