JUDGMENT OF THE COURT (Second Chamber)

1 July 2010 *

In Case C-35/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte Suprema di Cassazione (Italy), made by decision of 3 December 2008, received at the Court on 28 January 2009, in the proceedings

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate

v

Paolo Speranza,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 January 2010,

after considering the observations submitted on behalf of:

— Mr Speranza, by W. Viscardini and G. Doná, avvocati,

— the Italian Government, by I. Bruni, acting as Agent, and P. Gentili and D. Del Gaizo, avvocati dello Stato,

— the European Commission, by A. Aresu and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 March 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1)(C) 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'), and the principle of proportionality.

2 The reference was made in proceedings between the Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and the Agenzia delle Entrate (Reveue Agency), and Mr Speranza, a notary in Padua (Italy), concerning a statement of charges issued by the Ufficio del Registro in Padua, a local agency of the Agenzia delle Entrate, in connection with the joint and several liability of LEJA Srl ('LEJA'), a company established in Padua, and Mr Speranza arising as a result of the registration a document recording an increase in the share capital of that company.

Legal context

European Union legislation

3 Article 1 of Directive 69/335 provides that '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(1)(a) of Directive 69/335 defines capital companies as, inter alia, companies governed by Italian law known as 'società per azioni' (public limited companies) and 'società a responsabilità limitata' (limited liability companies).

5 Article 4(1)(c) of the directive provides that 'an increase in the capital of a capital company by contribution of assets of any kind' is to be subject to capital duty.

6 According to Article 5(1)(a) of Directive 69/335, capital duty is to be charged 'in the case of … an increase in [the] capital [of a capital company] … 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'.

7 Article 7 of Directive 69/335 provides that taxable transactions are subject to duty at a rate which could not, at the time of the facts in the main proceedings, exceed 1%, subject to the exemptions provided for in the directive.

National legislation

8 Article 1 of the testo unico delle disposizioni concernenti la imposta di registro (the consolidated provisionss on registration duty), approved by Decree No 131 of the President of the Republic of 26 April 1986 (Ordinary Supplement to GURI No 99 of 30 April 1986) ('the consolidated provisions'), in the version applicable at the material time, provides that 'registration duty shall be payable … on instruments subject to compulsory registration and on those voluntarily submitted for registration'.

9 In accordance with Articles 2 and 27(5) of the consolidated provisions and Article 4(a)(5) of Tariff I annexed to the consolidated provisions, instruments recording an increase in capital are subject to registration, following approval, and to duty equivalent to 1% of the increase approved.

10 The Corte Suprema di Cassazione states that, since registration duty is a tax on documents, it is irrelevant, for taxation purposes, whether the capital contribution was in fact made.

11 Article 38 of the consolidated provisions provides that the fact that an instrument recording a transaction is null and void, or may be annulled, does not extinguish the obligation to pay duty and that the duty paid may be returned only after a civil

judgment declaring that the instrument is null and void or annulling it, on grounds not involving fault on the part of either party, becomes final. It follows that the tax court is precluded from declaring, as an incidental matter, that the instrument is void, as is provided for generally in relation to tax jurisdiction by Article 2(3) of Legislative Decree No 546 laying down provisions relating to proceedings before the tax courts pursuant to the powers delegated to the Government by Article 30 of Law No 413 of 30 December 1991 (disposizioni sul processo tributario in attuazione della delega al Governo contenuta nell'art. 30 della legge 30 dicembre 1991, n. 413) of 31 December 1992 (Ordinary Supplement to GURI No 9 of 13 January 1993).

12 In accordance with Article 57(1) and (2) of the consolidated provisions, in addition to the company receiving the increase in share capital, the public officer who drafted the minutes recording the transaction is also jointly and severally liable for the duty.

13 According to the Corte Suprema di Cassazione, it is apparent from Article 27 of Law No 89 on the rules governing the notarial profession and notarial archives (legge n. 89, sull'ordinamento del notariato e degli archivi notarili) of 16 February 1913 (*Gazzetta Ufficiale* No 55 of 7 March 1913), that the notary is under a duty to act when requested to do so.

14 Article 28 of that law authorises the notary to refuse to draft any document when called upon to do so 'if the parties do not provide him with the funds to cover the taxes, fees and expenses relating to the document'.

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

15 On 30 July 1993, at a general meeting of the shareholders of LEJA, a resolution was passed to transform the company into a public limited company and to increase the share capital in the company from ITL 20 000 000 (approximately EUR 10 329) to ITL 58 400 000 000 (approximately EUR 30 161 038).

16 The minutes of the general meeting were certified by Mr Speranza in his capacity as notary. Those minutes stated that one of the shareholders in LEJA, Tecnoitalia Srl, had subscribed for the entire increase in share capital approved by means of a contribution of 6 244 shares in Lama dd, a company entered in the registry of the Koper District Court (Slovenia). An expert appointed by the Tribunale di Padova (Padua District Court) valued the shares at ITL 58 380 000 000 (approximately EUR 30 150 754).

17 Following approval of the decision by the Corte d'appello di Venezia (Appeal Court, Venice), the instrument recording the increase in capital was assessed for duty at the proportional rate laid down by the applicable national legislation and the Ufficio del Registro in Padua issued a demand for payment of ITL 578 102 000 (approximately EUR 298 565), which was notified to both LEJA and Mr Speranza in his capacity as notary.

18 Mr Speranza unsuccessfully challenged that demand for payment before the competent tax court at first instance. The judgment delivered by that court was reversed on appeal.

19 The Ministero dell'Economia e delle Finanze and the Agenzia delle Entrate brought an appeal in cassation against that judgment, alleging infringement and misapplication of a number of provisions of the consolidated provisions.

20 Mr Speranza submits that the increase in capital at issue in the main proceedings did not materialise because Tecnoitalia Srl was never able to transfer the shares in Lama dd and this led to LEJA's insolvency. He also maintains that the national legislation is contrary to Directive 69/335, in so far as it provides, first, for the possibility, in the legislation on registration duty, that an instrument recording an increase in capital may be subject to duty even where the capital contribution has not in fact been effected and, second, that the attesting notary is jointly and severally liable.

21 The Corte Suprema di Cassazione considers that, on the basis of the national legislation, the appeal brought by the Ministero dell'Economia e delle Finanze and the Agenzia delle Entrate should be upheld.

22 Considering, first, that the registration duty at issue in the main proceedings must be classified as 'capital duty' within the meaning of Article 4(1)(c) of Directive 69/335 and, second, that Article 4(a)(5) of Tariff I annexed to the consolidated provisions, read in conjunction with Article 38 of those provisions, provides that the resolution alone to increase share capital is subject to duty, irrespective of whether or not it is implemented or is valid, the Corte Suprema di Cassazione entertains doubts as to whether the national legislation is compatible with Article 4(1)(c) of Directive 69/335.

23 It entertains the same doubts with regard to Article 57 of the consolidated provisions, in that it provides that the notary who drafted the instrument recording the transaction is jointly and severally liable for payment of the duty.

24 The referring court also states that, if the joint and several liability of the notary were to be regarded as compatible with Directive 69/335, the means of defence available to the notary, as a person unconnected with the dispute between the undertaking concerned and the tax authorities, may nevertheless be insufficient.

25 It is in those circumstances that the Corte Suprema di Cassazione decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 4(1)(c) of Directive [69/335], which provides that an increase in the capital of a capital company by contribution of assets of any kind is to be subject to capital duty, to be interpreted as meaning that an actual contribution is to be taxable, but not a mere decision to increase the share capital which remains essentially unimplemented?

(2) Is Article 4(1)(c) of Directive [69/335] to be interpreted as meaning that the duty must be levied exclusively on the company to which the capital is contributed and not also on the public officer who drafts or certifies the instrument?

(3) In any event, are the means of defence afforded to that public officer by the Italian legislation consistent with the principle of proportionality, in light of the fact that, under Article 38 of [the consolidated provisions], it is irrelevant whether the resolution to increase share capital is null and void or may be annulled, and repayment of the duty paid may be effected only after a civil judgment declaring the instrument null and void or annulling it has become final?'

The questions referred for a preliminary ruling

The admissibility of the third question

26 The Italian Government questions whether the Court has jurisdiction to answer the third question, relating to observance of the principle of proportionality.

27 According to that government, since the principle of proportionality is a general principle deriving from the EC Treaty, the Court can be called upon to interpret the scope of the principle only in cases concerning situations that have cross-border implications. The facts of the case in the main proceedings relate to a situation that is purely internal. Consequently, the principle of proportionality cannot preclude the application of the national provisions at issue in the main proceedings and the Court does not have jurisdiction to rule on the substance.

28 In that regard, it is sufficient to point out that, as is apparent from settled case-law, the requirements flowing from the protection of the general principles recognised in the legal order of the European Union are also binding on Member States when they implement Union rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 105 and the case-law cited).

29 In the present case, the Corte Suprema di Cassazione refers to the principle of proportionality in connection with the implications of the application of Article 38 of the consolidated provisions as regards the circumstances in the main proceedings. It is clear that those provisions, in particular Articles 1, 2, 10, 13, 14, 27, 38 and 57 thereof, are intended to transpose Directive 69/335 into Italian law.

30 Consequently, since the referring court refers to the principle of proportionality in the context of the implementation by the Italian Republic of Directive 69/335, the third question is admissible.

Questions 1 and 3

31 By its first and third questions, which it is appropriate to consider together, the Corte Suprema di Cassazione asks, in essence, whether Article 4(1)(c) of Directive 69/335 precludes national legislation which provides that the registration of an instrument recording an increase in the capital of a company is subject to payment of capital duty and whether the principle of proportionality precludes national legislation which restricts, before the tax courts, the means of proving that no contribution was in fact effected to increase the capital of the company to the production of a civil judgment that has become final declaring the registration null and void or annulling it, so that capital duty must in any event be paid and can be reimbursed only by means of the production of such a civil judgment.

32 The Court has already held that the event giving rise to capital duty is the contribution of assets increasing the capital of a company itself and not some other transaction or formality (Case C-46/04 *Aro Turbi Trafilerie* [2006] ECR I-3009, paragraph 27).

33 However, the Court has also held that Articles 4(1)(c) and 5(1)(a) of Directive 69/355 do not specify the point at which the chargeable event for capital duty occurs (Case C-339/99 *ESTAG* [2002] ECR I-8837, paragraph 49).

34 Since Article 5(1)(a) of Directive 69/335 permits capital duty to be charged on assets contributed or to be contributed by the members and for the charging of duty to be deferred until the contributions have been effected, the Member States can demand payment of the duty either after the assets have actually been contributed or at the same time as that contribution is effected or even before that event, provided that the contribution is definite (see, to that effect, *ESTAG*, paragraph 50).

35 It follows that Article 4(1)(c) of Directive 69/335 does not preclude a Member State from identifying the registration of an instrument recording an increase in the capital of a company as the point at which the chargeable event for capital duty occurs, provided that there remains a connection between the levying of the duty and the actual contribution of assets to the company receiving them (see, to that effect, *ESTAG*, paragraphs 49 and 50).

36 If, at the time when such an instrument is executed, the actual contribution of assets has not yet been effected and it remains uncertain whether it will be effected, the Member State concerned cannot demand payment of capital duty until the contribution has become definite (see, to that effect, *ESTAG*, paragraphs 50 and 51).

37 In the present case, it is apparent from the file before the Court that, when the instrument recording an increase in the capital of LEJA was registered, the documentary evidence provided in support of the application for registration indicated that the contribution of assets had already been effected or was, at the very least, definite.

38 However, it is also apparent from that file that it subsequently emerged, before the duty had been paid, that, as a result of fraud, the contribution of assets had not in fact taken place at the time at the time of registration and it was clear that it would not take place. In such circumstances and in the light of the considerations set out at paragraphs 32, 34 and 36 above, there could therefore be no demand for payment of capital duty.

39 The Corte Suprema di Cassazione states that, in accordance with Article 38 of the consolidated provisions, where the instrument recording the capital contribution has been registered, capital duty must in any event be paid and may be reimbursed only when a civil judgment that has become final declaring the registration null and void is produced before the tax courts.

40 In view of the considerations set out at paragraphs 32, 34 and 36 above, in particular the fact that demand for payment of capital duty can be made only when the subsequent contribution of assets is definite, Articles 4(1)(c) and 5(1)(a) of Directive 69/335 must be interpreted as precluding such national legislation.

41 While it is correct, as submitted by the Italian Government, that Directive 69/335 does not in any way concern the manner in which Member States organise the rules of their tax courts or the procedure applicable to actions brought before them, the fact remains that, according to established case-law, a procedural rule laid down by the domestic legal system of a Member State must not render in practice impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) (see, inter alia, Case C-542/08 *Barth* [2010] ECR I-3189, paragraph 17 and the case-law cited).

42 The requirement of effectiveness embodies the general obligation on the Member States to ensure judicial protection of an individual's rights under European Union law. It applies both as regards the designation of the courts and tribunals having jurisdiction to hear and determine actions based on European Union law and as regards the definition of detailed procedural rules (see, to that effect, Joined Cases C-317/08 and C-320/08 *Alassini and Others* [2010[ECR I-2213, paragraph 49 and the case-law cited).

43 The Court has stated that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 39 and the case-law cited).

44 In the present case, the Corte Suprema di Cassazione has stated that Article 2(3) of Legislative Decree No 546 of 31 December 1992 provides that the tax courts and tribunals have a general power to declare acts null and void as an incidental matter. It appears that the effect of such a declaration is to enable taxable persons to escape payment of a tax, since the tax is no longer chargeable.

45 However, as regards capital duty, it is apparent from the order for reference that the tax court is precluded from declaring, as an incidental matter, that an act is void, since the fact that the instrument by which the capital contribution was registered is null and void or may be annulled does not relieve the taxable person of the obligation, under Article 38 of the consolidated provisions, to pay the duty in question.

46 It follows that, in a situation such as that in the main proceedings, an action before the Italian tax courts to prevent recovery of capital duty, payment of which, under Directive 69/335, cannot be demanded is, contrary to the Italian Government's claims, wholly ineffective, whereas, under the general procedural rules described by the referring court, in similar actions against other taxes the taxable person may be relieved of the obligation to pay a tax that is not payable.

47 Therefore, as Mr Speranza and the European Commission correctly submitted, national legislation which restricts, before the tax courts, the means of proving that no contribution was in fact effected to increase the capital of a company, in accordance with the company's resolution, to the production of a civil judgment that has become final declaring the registration null and void or annulling it, so that capital duty must in any event be paid and can be reimbursed only by means of the production of such a civil judgment, must be regarded as making it in practice impossible or, at the very least excessively difficult, to exercise the rights conferred by Directive 69/335.

48 In the light of the foregoing and without there being any need to interpret the principle of proportionality, the answer to questions 1 and 3 is that Articles 4(1)(c) and 5(1)(a) of Directive 69/335 must be interpreted as not precluding a Member State from identifying the registration of an instrument recording an increase in the capital of a company as the point at which the chargeable event for capital duty occurs, provided that there remains a connection between the levying of the duty and the actual contribution of assets to the company intended to receive them. If, at the time when such an instrument is executed, the actual contribution of assets has not yet been effected and it remains uncertain whether it will be effected, the Member State concerned cannot demand payment of capital duty until the contribution has become definite. The principle of effectiveness must be interpreted as precluding national legislation which restricts, before the tax courts, the means of proving that no contribution was in fact effected to increase the capital of a company, in accordance with the company's resolution, to the production of a civil judgment that has become final

declaring the registration null and void or annulling it, so that capital duty must in any event be paid and can be reimbursed only by means of the production of such a civil judgment.

Question 2

49 By its second question, the Corte Suprema di Cassazione asks, in essence, whether Article 4(1)(c) of Directive 69/335 precludes the requirement that capital duty must be paid by the public officer who drafted or certified the instrument recording the increase in capital, in addition to the company to which the capital is to be contributed.

50 It is apparent from the case-law that, according to the scheme and structure of Directive 69/335, capital duty is to be levied on the capital company receiving the contribution in question. The recipient is normally the company to which the resources or services in question are physically given. It is only exceptionally that that is not the case and that it is necessary to seek to identify the 'real recipient' of the resources or services in question (Case C-494/03 *Senior Engineering Investments* [2006] ECR I-525, paragraph 25).

51 Moreover, it is also apparent from that scheme and structure that Member States cannot exempt the company which has received a capital contribution from capital duty in circumstances other than those set out in Article 6 to 9 and 11 of Directive 69/335.

52 However, as the Advocate General pointed out at point 38, 39 and 47 of his Opinion, Directive 69/335 does not seek to harmonise the arrangements for the collection of capital duty, which are designed to ensure that the taxable person's obligation to pay tax is fulfilled and to simplify the charging of capital duty.

53 The joint and several liability of the public officer who drafted or certified the instrument recording an increase in the capital of a company must be regarded as constituting both a guarantee that the company receiving the increase in capital will fulfil its obligation to pay duty and a measure designed to simplify the charging of capital duty.

54 It follows that Directive 69/335 does not, in principle, preclude a Member State from conferring responsibility on the public officer who drafted or certified the instrument recording the increase in capital.

55 However, as is apparent from paragraphs 50 and 51 above, capital duty is to be levied on the capital company receiving the contribution in question, since the Member States cannot exempt the company which has received a capital contribution from capital duty in circumstances other than those set out in Article 6 to 9 and 11 of Directive 69/335.

56 Making the public officer jointly and severally liable for payment of capital duty would go beyond what is necessary to meet the objectives set out at paragraphs 53 and 54 above, if the public officer did not have the right to bring an action for indemnity against the company receiving the capital contribution.

57 In the present case, it is apparent from the file, first, that under Article 28 of Law No 89 of 16 February 1913, the notary may refuse to draft any document when called upon to do so if the parties do not provide him with the funds to cover the taxes, fees

and expenses relating to the document and, second, that the notary has the right to bring an action for indemnity against the company receiving the capital contribution.

58 In the light of the foregoing, the answer to question 2 is that Directive 69/335 must be interpreted as not precluding a Member State from providing that the public officer who drafted or certified the instrument recording the increase in capital is jointly and severally liable for payment of capital duty, provided that the officer has the right to bring an action for indemnity against the company receiving the capital contribution.

Costs

59 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 (Second Chamber) hereby rules:

1. **Articles 4(1)(c) and 5(1)(a) 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 not precluding a Member State from identifying the registration of an instrument recording**

an increase in the capital of a company as the point at which the chargeable event for capital duty occurs, provided that there remains a connection between the levying of the duty and the actual contribution of assets to the company receiving them. If, at the time when such an instrument is executed, the actual contribution of assets has not been effected and it remains uncertain whether it will be effected, the Member State concerned cannot demand payment of capital duty until the contribution has become definite. The principle of effectiveness must be interpreted as precluding national legislation which restricts, before the tax courts, the means of proving that no contribution was in fact effected to increase the capital of a company, in accordance with the company's resolution, to the production of a civil judgment that has become final declaring the registration null and void or annulling it, so that capital duty must in any event be paid and can be reimbursed only by means of the production of such a civil judgment.

2. **Directive 69/335, as amended, must be interpreted as not precluding a Member State from providing that the public officer who drafted or certified the instrument recording the increase in capital is jointly and severally liable for payment of capital duty, provided that the officer has the right to bring an action for indemnity against the company receiving the capital contribution.**

[Signatures]