OPINION OF ADVOCATE GENERAL JACOBS
delivered on 14 May 1992 *

1. In this case, the Bundesfinanzhof has referred two questions on the interpretation of Article 4(2)(b) 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, hereafter 'the directive'):

'(1) Are Member States permitted under Article 4(2)(b) of Directive 69/335/EEC to tax payments made, not by a member of the company, but by an association of which the member is also a shareholder or member, under a profit transfer agreement concluded with the company?

(2) If the first question is answered in the affirmative, is the taxable payment under Article 4(2)(b) made at the time that the profit transfer agreement takes effect in civil law or only at the time that the profits are actually transferred?'

2. Article 4(2)(b) provides that, among the transactions which a Member State may make subject to capital duty, is:

'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'.

It is to be noted that the French version of the directive does not refer specifically to the provision of *services*, but more generally to:

'l'augmentation de l'avoir social d'une société de capitaux *au moyen de prestations* effectuées par un associé ...'.

Similarly, the German version refers to 'Leistungen', a term which can cover payments as well as the performance of services.

The facts of the case

3. The plaintiff, Weber Haus GmbH & Co. KG, is a limited partnership established

* Original language: English.

in Rheinau-Linx whose partners comprise two natural persons (Mr and Mrs Weber) and a limited company (Weber Haus GmbH Verwaltungsgesellschaft), the latter being the partner with unlimited liability under the partnership. Mr and Mrs Weber also hold more than 99% of the shares in a limited company, also established in Rheinau-Linx, which is called 'Hans Weber Fertighausbau GmbH' (hereafter 'the limited company'). On 1 January 1977 the plaintiff partnership entered into an agreement (known as an 'Organschaftsvertrag') with the limited company, providing for financial, economic and organizational cooperation between the two bodies of such a kind as to integrate the limited company within the plaintiff undertaking. I shall refer to the structure arising under the agreement as the 'Organschaft'. The Organschaft agreement states that financial integration is ensured by the fact that the shares owned by Mr and Mrs Weber in the limited company are held as assets ('Betriebsvermögen') of the plaintiff partnership. The agreement also provides that the partnership is to receive all the profits of the limited company and to meet all its losses. Pursuant to that agreement, the limited company transferred to the plaintiff its entire profit for the year 1977, namely DM 5 666 634. The question at issue in the main proceedings is whether, as the tax authorities maintain, that transfer is liable to capital duty under national provisions implementing Article 4(2)(b) of the directive.

'For the purposes of the application of this directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

It appears that, pursuant to that provision, the German legislation treats a limited partnership as a capital company where, like the plaintiff, its partner (or partners) with unlimited liability is a capital company stricto sensu: see paragraph 3 of the Court's judgment in Case 270/81 *Felicitas* v *Finanzamt für Verkehrsteuern* [1982] ECR 2771. As the Commission points out, that treatment is consistent with Council Directive 90/605/EEC, amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts (OJ 1990 L 317, p. 60), which extended the scope of those directives to such entities.

The first question

4. At first sight it might seem surprising that a limited partnership should be treated as a capital company for the purposes of the directive. However, after defining the various categories of capital company in Article 3(1), the directive provides in Article 3(2) that:

5. The first question asks in substance whether Member States may charge capital duty on profits transferred to a capital company by another company, under a

profit transfer agreement, where the two companies have a common shareholder or member.

6. The plaintiff partnership argues that the directive does not permit capital duty to be imposed in such circumstances. It claims that the tax authorities' view leads to inconsistent treatment for the purposes of corporate or income tax, on the one hand, and capital duty, on the other. For the purposes of the former taxes, the existence of the Organschaft is recognized, and the profits are not taxed in the hands of the limited company but directly as income or corporate tax in the hands of the partners of the limited partnership. The transfer of profits is therefore treated as a payment by the company to a shareholder. For capital duty purposes, on the other hand, the Organschaft is disregarded, and the transfer of profits is treated as a payment by the shareholders (Mr and Mrs Weber) to the partnership. The Court should, in the plaintiff's view, analyse the transfer of profits as a payment by the limited company to the plaintiff, its effective shareholder.

7. The Commission takes a different view. It submits that the directive does not prevent the Member States from subjecting to capital duty services or payments effected by a company to a capital company where the two companies have a common member, provided that it is established that in the circumstances of the case it is in reality the member who, through the intermediary of the first company, makes the contribution to the second company.

8. Whilst there may indeed be circumstances in which a shareholder makes a contribution to a capital company through the intermediary of another company which he controls, it seems to me that that is not the situation here. The essence of the Organschaft agreement concerned in this case is that Mr and Mrs Weber contributed their shares in the limited company, or at least the rights represented by the shares, to the business assets of the partnership, which assumed full financial and administrative control over the limited company. In my view, the only taxable event for capital duty purposes to which that agreement gives rise is the increase in the capital or assets of the partnership by virtue of a contribution consisting in the rights represented by the shares in the limited company. It is to be noted that, although the nominal ownership of the shares remained with Mr and Mrs Weber, the capital value of the partnership was increased by the transfer to it of the rights represented by the shares, in particular the right to receive future profits of the company. When however profits were subsequently transferred from the limited company to the partnership, pursuant to the profit transfer clause in the Organschaft agreement, it seems to me that profits accrued directly to the partnership in its own right, and as effective shareholder, rather than being contributed to the partnership by its partners. Thus, it does not seem to me that a transfer of profits in these circumstances can be regarded as a contribution by a member of a capital company for the purposes of Article 4(2)(b).

9. The tax authorities' view that the transfer of profits was liable to capital duty as a contribution by the partners would be tenable only if the shares were seen as belonging to the partners' private estate for capital duty

purposes. However, it appears from the file, and from the plaintiff's reply to questions put at the hearing, that the shares are on the contrary treated as assets of the partnership. They are included in its accounts, and the profits of the limited company accrue to the partnership as a whole. It seems to me that to regard the shares as assets of the partnership for corporate or income tax purposes, but as private assets of the partners for capital duty purposes, would lead to anomalous results. It would be impossible for profits arising within the limited company to be distributed without being subject to capital duty. That would run counter to the very nature of capital duty, which is not a tax on profits earned or distributed but a tax on the raising of capital. Such an analysis would also involve a misunderstanding of the structure which has been created by the Organschaft agreement, which may be compared to the relationship of holding company and subsidiary. If the Webers had created another limited company to act as the parent company of the Organschaft and had transferred their shares in the first limited company to the parent company in return for shares in the latter, any subsequent transfer of profits under the Organschaft agreement would simply have been a distribution of profits by a subsidiary to its shareholder. Similarly, in the present case, Mr and Mrs Weber contributed their rights in the shares to the assets of the partnership, which acts as a conduit for the distribution of profits, subject to any profits retained within the partnership. Any analysis which treats the transfer of profits from the limited company at the end of each accounting period as an investment of capital by the partners in the partnership would lead to the manifestly absurd result of capital duty being imposed on the entire trading profits of the limited company, even those which are ultimately distributed by the Organschaft to the partners.

10. In its Order for Reference the Bundesfinanzhof refers to the Court's judgment in Case C-38/88 *Siegen* [1990] ECR I-1447, in which the Court held that the absorption of a subsidiary company's losses by its parent company, pursuant to a profit and loss transfer agreement concluded before those losses were determined, did not increase the assets of the subsidiary for the purposes of Article 4(2)(b) of the directive. That decision was based on the ground that, in consequence of the transfer agreement, any losses made by the subsidiary would have no effect on the level of its assets, and hence the absorption of those losses could not be regarded as an increase in that company's assets for the purposes of Article 4(2)(b): see paragraph 13 of the judgment. It is however to be noted that the present case concerns a situation which is, in substance, the converse of the one arising in *Siegen*. As we have seen, the transfer of profits under the Organschaft agreement should be treated as a transfer *by* a capital company *to* its shareholder, rather than the reverse. Quite apart from any prior agreement to transfer profits, therefore, the transaction at issue could not give rise to any liability under Article 4(2)(b).

11. In my view therefore the first question should be answered in the negative. It follows that a reply to the second question is unnecessary.

Conclusion

12. I am accordingly of the opinion that the Court should rule as follows:

Article 4(2)(b) of Directive 69/335/EEC does not permit Member States to charge capital duty on the transfer of profits from a company to a limited partnership, under a profit transfer agreement, where the company and the partnership have a common member and that member has previously contributed the rights represented by his shares in the company to the business assets of the partnership.