JUDGMENT OF THE COURT (First Chamber)

5 July 2007 *

In Case C-321/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Østre Landsret (Denmark), made by decision of 3 August 2004, received at the Court on 23 August 2005, in the proceedings

Hans Markus Kofoed

v

Skatteministeriet,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič and E. Levits, Judges,

* Language of the case: Danish.

Advocate General: J. Kokott,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 18 January 2007,

after considering the observations submitted on behalf of:

— Hans Markus Kofoed, by L. Melchior Kjeldsen, advokat,

— the Danish Government, by J. Molde, acting as Agent, and K. Lundgaard Hansen, advokat,

— the United Kingdom Government, by C. Gibbs, acting as Agent, and J. Stratford, Barrister,

— the Commission of the European Communities, by H. Støvlbæk and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(d), 8 and 11 of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).

2 The reference was made in the context of proceedings between Mr Kofoed and the Skatteministeriet (Danish Ministry of Fiscal Affairs) concerning the charging of income tax on an exchange of shares.

Legal framework

Community legislation

3 According to the first recital in the preamble to Directive 90/434, the purpose of the directive is to ensure that restructuring operations of companies of different Member States, such as mergers, divisions, transfers of assets and exchanges of shares, are not hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States.

4 To that end, Directive 90/434 establishes a scheme under which those operations are not themselves taxable. Any capital gains arising from those operations may, in principle, be taxed, but only at the time at which they actually take place.

5 Article 2(d) of Directive 90/434 defines 'exchange of shares' as 'an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange'.

6 According to Article 2(g) and (h) of Directive 90/434, 'acquired company' means 'the company in which a holding is acquired by another company by means of an exchange of securities' and 'acquiring company' means 'the company which acquires a holding by means of an exchange of securities'.

7 Article 8(1) and (4) of that directive reads as follows:

'1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

...

4. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account when taxing shareholders any cash payment that may be made on the merger, division or exchange.'

8 Article 11(1)(a) of Directive 90/434 provides that a Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV of the directive where it appears that the exchange of shares has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.

National legislation

9 Under Danish law, the tax treatment of exchanges of shares is governed by the Aktieavancebeskatningslov (Law on the taxation of capital gains upon disposal of shares) of 15 September 1993 (*Lovtidende* 1993, p. 4171; 'the Aktieavancebeskatningslov') and the Fusionsskattelov (Law on the tax treatment of mergers) of 27 August 1992 (*Lovtidende* 1992, p. 3374; 'Fusionsskattelov').

10 Paragraph 13 of the Aktieavancebeskatningslov provides:

'1. In the case of exchange of shares, where both the acquiring and the acquired company are included in the definition of a "company from a Member State" set out in Article 3 of Directive 90/434/EEC, shareholders in the acquired company shall have the right to be taxed under Paragraphs 9 and 11 of the Fusionsskattelov. In this connection the date of the exchange of shares shall be regarded as the date of merger. It shall be a precondition that the exchange of shares be effected within a period of no more than six months from the first day of the exchange.

2. "Exchange of shares" (within the meaning of subparagraph 1) shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange.

...'

11 Paragraph 9 of the Fusionsskattelov, referred to in Paragraph 13(1) of the Aktieavancebeskatningslov, is worded as follows:

'1. Where in respect of shares in the [acquired company] consideration provided is other than by way of shares in the acquiring company, the shareholder shall be deemed to have effected a third-party sale of the shares in the [acquired company].
...

...'

12 Paragraph 11 of the Fusionsskattelov provides:

'1. In determining general or special taxable income, shares of the [acquiring company] acquired by its shareholders as consideration for the [acquired company]

shall be treated as if they had been acquired on the same date and at the same price as the shares for which they were exchanged. ...

...'

13 It is common ground that, at the time of the facts material to the main proceedings, there were no specific provisions in Danish law transposing Article 11 of Directive 90/434.

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

14 Mr Kofoed and Mr Toft each held 50% of the total share capital of Cosmopolit Holding ApS ('Cosmopolit'), a limited liability company incorporated under Danish law having share capital of DKK 240 000.

15 On 26 October 1993, they each acquired one share for the price of IEP 1 in Dooralong Ltd ('Dooralong'), a limited liability company incorporated under Irish law, those two shares constituting the share capital of Dooralong.

16 Dooralong subsequently increased its share capital by issuing 21 000 new shares for the price of IEP 1.

17 On 29 October 1993, Mr Kofoed and Mr Toft exchanged all the shares they held in Cosmopolit for all the new shares in Dooralong. As a result of that exchange, they thus each held 10 501 shares in Dooralong. The latter held the total share capital of Cosmopolit.

18 On 1 November 1993, Dooralong collected a dividend of IEP 2 742 616 (approximately DKK 26 000 000), paid by its newly acquired subsidiary Cosmopolit, the shareholders' equity of which was thereby reduced to DKK 1 709 806.

19 On 3 November 1993, Dooralong's general meeting decided to distribute a dividend of IEP 2 742 116 to its two shareholders, Mr Kofoed and Mr Toft.

20 For the purposes of his income tax relating to the year 1993, Mr Kofoed stated in his income declaration that the exchange of shares in Cosmopolit in return for new shares in Dooralong should be exempt from tax. The Danish tax authorities did not accept that statement, taking the view that the dividend distribution had to be regarded as forming part of the exchange of shares, with the result that the maximum threshold of 10% of the nominal value of the securities issued in exchange, provided for by Directive 90/434 for a possible cash payment, had been exceeded. In the authorities' view, that exchange of shares could accordingly not be exempt under that directive.

21 Mr Kofoed thereupon challenged before the Landsskatteret (National Tax Court) the decision of the tax authorities to the effect that the exchange of shares in question could not be exempted under Directive 90/434. When that decision was upheld, Mr Kofoed brought an action before the Østre Landsret (Eastern Regional Court).

22 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 2(d) of Directive 90/434/EEC ... to be interpreted as meaning that there is no "exchange of shares" within the meaning of that directive where the persons involved in the exchange of shares, at the same time as agreeing to exchange the shares in a non-legally binding manner, declare it to be their common intention to vote, at the first general meeting of the acquiring company after the exchange, in favour of distributing a profit in excess of 10% of the nominal value of the security transferred by way of the exchange of shares and such a profit is in fact distributed?'

The question referred for a preliminary ruling

23 By its question, the national court asks, essentially, whether, in circumstances such as those in the main proceedings, Article 8(1) of Directive 90/434 precludes taxation of an exchange of shares such as the one in question.

In that context, the national court asks, first, whether such an exchange of shares constitutes an 'exchange of shares' within the meaning of Article 2(d) of that directive and, more specifically, whether or not a dividend such as the one paid must be included in the calculation of the cash payment provided for in that article.

Second, the national court asks, essentially, whether the tax authorities may react to a possible abuse of rights, even though the national legislature has not enacted specific measures to transpose Article 11 of Directive 90/434.

The classification as an 'exchange of shares' within the meaning of Directive 90/434

24 The Court notes, as a preliminary point, that Article 8(1) of Directive 90/434 provides that an allotment of securities accruing from an exchange of shares to shareholders of the acquired company may not be taxed.

25 According to the definition contained in Article 2(d) of that directive, an 'exchange of shares' is an 'operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange'.

26 In the main proceedings, it is common ground that the exchange of shares in question was, in principle, effected in the context of an acquisition within the terms of that provision.

27 The parties disagree, however, on whether or not the dividend paid by Dooralong to Mr Kofoed and Mr Toft shortly after that exchange of shares should be regarded as forming part of that acquisition. If so, the 10% threshold provided for by Article 2(d) of Directive 90/434 for a cash payment has been exceeded and that exchange of shares must be taxed.

28 The Court finds in this regard, as noted by the Advocate General in points 44 to 47 and points 52 and 53 of her Opinion, that the concept of 'cash payment' within the meaning of Article 2(d) of Directive 90/434 covers monetary payments having the

characteristics of genuine consideration for the acquisition, namely payments agreed upon in a binding manner in addition to the allotment of securities representing the share capital of the acquiring company, irrespective of any reasons underlying the acquisition.

29 Both the scheme and the logic of Directive 90/434 tend to support the position that the cash payment and the acquisition are part of the same transaction. The payment is part and parcel of the consideration paid by the acquiring company to the shareholders of the acquired company with a view to obtaining a majority holding in the latter.

30 Likewise, the Court has previously had the opportunity to state that it is clear from Article 2(d) and from the general scheme of Directive 90/434 that the common tax rules which it lays down, which cover different tax advantages, apply without distinction to all mergers, divisions, transfers of assets or exchanges of shares irrespective of the reasons, whether financial, economic or simply fiscal, for those operations (see Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 36).

31 Consequently, a monetary payment made by an acquiring company to the shareholders of the acquired company cannot be classified as a 'cash payment' for the purposes of Article 2(d) of Directive 90/434 merely because of a certain temporal or other type of link to the acquisition, or possible fraudulent intent. On the contrary, it is necessary to ascertain in each case, having regard to the circumstances as a whole, whether the payment in question has the characteristics of binding consideration for the acquisition.

32 That interpretation is supported by the purpose behind Directive 90/434, which is to eliminate fiscal barriers to cross-border restructuring of undertakings, by ensuring that any increases in the value of shares are not taxed before they are actually

realised and by preventing operations involving high levels of capital gains realised on exchanges of shares from being exempt from income tax simply because they are part of a restructuring operation.

33 The Court finds that, in the main proceedings, there is nothing in the case-file demonstrating that the dividend in question formed an integral part of the necessary consideration to be paid by Dooralong for the acquisition of Cosmopolit, which is the necessary condition for it to qualify as a 'cash payment' within the terms of Article 2(d) of Directive 90/434. On the contrary, according to the national court, it is common ground that at no time was there any agreement between Mr Kofoed and Mr Toft, on the one hand, and Dooralong, on the other, by which the latter was bound to distribute that dividend.

34 In those circumstances, the dividend in question in the main proceedings cannot be included in the calculation of the 'cash payment' provided for in Article 2(d) of Directive 90/434.

35 Consequently, the exchange of shares in question is covered by Article 8(1) of Directive 90/434, which implies that it cannot, in principle, be subject to tax.

36 However, since the national court and the Danish Government state several times that the exchange of shares in issue in the main proceedings was not carried out for any commercial reason whatsoever but solely for the purpose of achieving tax savings, it is still appropriate to consider the application of Article 8(1) in the event of possible abuse of rights.

Whether a possible abuse of rights may be taken into account

37 Under Article 11(1)(a) of Directive 90/434, by way of exception and in specific cases, Member States may refuse to apply or withdraw the benefit of all or any part of the provisions of that directive, inter alia, where the exchange of shares has tax evasion or tax avoidance as its principal objective or as one of its principal objectives. That same provision also provides that the fact that the operation is not carried out for valid commercial reasons, such as the restructuring or rationalisation of the activities of the companies participating in the operation, may constitute a presumption that the operation has such an objective (see, to that effect, *Leur-Bloem*, paragraphs 38 and 39).

38 Thus, Article 11(1)(a) of Directive 90/434 reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see, to that effect, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 68 and 69; Case C-456/04 *Agip Petroli* [2006] ECR I-3395, paragraphs 19 and 20; and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 35).

39 As indicated by the Advocate General in point 59 of her Opinion, it is true that, in the main proceedings, there is some evidence which might justify application of Article 11(1)(a) of Directive 90/434.

40 However, it is necessary, as a preliminary issue, to determine whether, in the absence of a specific transposition provision transposing Article 11(1)(a) of Directive 90/434 into Danish law, that provision may nevertheless apply in the case in the main proceedings.

41 In that regard, it should be borne in mind that, according to Articles 10 EC and 249 EC, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues (see, inter alia, the judgment of 10 March 2005 in Case C-531/03 *Commission* v *Germany*, not published in the ECR, paragraph 16, and Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 50).

42 Moreover, the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Directives cannot therefore be relied upon per se by the Member State as against individuals (see, inter alia, Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545, paragraphs 19 and 20; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraphs 9 and 13; Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraphs 36 and 37; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 73 and 74).

43 However, the Court observes, first, that, according to the actual wording of the third paragraph of Article 249 EC, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by those directives (see, to that effect, *Commission* v *Italy*, paragraph 51).

44 Accordingly, provided that the legal situation arising from the national transposition measures is sufficiently precise and clear and that the persons concerned are put in a

position to know the full extent of their rights and obligations, transposition of a directive into national law does not necessarily require legislative action in each Member State. Likewise, as noted by the Advocate General in point 62 of her Opinion, the transposition of a directive may, depending on its content, be achieved through a general legal context, so that a formal and express re-enactment of the provisions of the directive in specific national provisions is not necessary (see *Commission* v *Italy*, paragraph 51, and Case C-428/04 *Commission* v *Austria* [2006] ECR I-3325, paragraph 99).

45 The Court notes, second, that all authorities of a Member State, in applying national law, are required to interpret it as far as possible in the light of the wording and purpose of the Community directives in order to achieve the result pursued by those directives. Moreover, although it is true that the requirement of a directive-compliant interpretation cannot reach the point where a directive, by itself and without national implementing legislation, may create obligations for individuals or determine or aggravate the liability in criminal law of persons who act in contravention of its provisions, a Member State may nevertheless, in principle, impose a directive-compliant interpretation of national law on individuals (see, to that effect, *Kolpinghuis Nijmegen*, paragraphs 12 to 14, and *Arcaro*, paragraphs 41 and 42).

46 As noted by the Advocate General in point 63 of her Opinion, in the main proceedings it is therefore for the national court to ascertain whether there is, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with Article 11(1)(a) of Directive 90/434 and thereby justify taxation of the exchange of shares in question (see also Case 8/81 *Becker* [1982] ECR 53, paragraph 34).

47 If so, it will be for the national court to determine whether the conditions for the application of those national provisions are satisfied in the main proceedings.

48 In the light of all the foregoing, the answer to the question referred must be that, in circumstances such as those in the main proceedings, a dividend, such as that paid, is not to be included in the calculation of the 'cash payment' provided for in Article 2(d) of Directive 90/434 and that, accordingly, an exchange of shares such as that in issue constitutes an 'exchange of shares' within the meaning of Article 2(d) of that directive.

Consequently, Article 8(1) of Directive 90/434 precludes, in principle, the taxation of such an exchange of shares, unless national rules on abuse of rights, tax evasion or tax avoidance may be interpreted in accordance with Article 11(1)(a) of Directive 90/434 and thus justify the taxation of that exchange.

Costs

49 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 in the main proceedings, a dividend, such as that paid, is not to be included in the calculation of the 'cash payment' provided

for in Article 2(d) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States and that, accordingly, an exchange of shares such as that in issue constitutes an 'exchange of shares' within the meaning of Article 2(d) of that directive.

Consequently, Article 8(1) of Directive 90/434 precludes, in principle, the taxation of such an exchange of shares, unless national rules on abuse of rights, tax evasion or tax avoidance may be interpreted in accordance with Article 11(1)(a) of Directive 90/434 and thus justify the taxation of that exchange.

[Signatures]