JUDGMENT OF THE COURT (Fourth Chamber)

16 June 2011 *

In Case C-212/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny w Gliwicach (Poland), made by decision of 15 March 2010, received at the Court on 3 May 2010, in the proceedings

Logstor ROR Polska sp. z o.o.

v

Dyrektor Izby Skarbowej w Katowicach,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, C. Toader, A. Prechal and E. Jarašiūnas, Judges,

* Language of the case: Polish.

Advocate General: P. Mengozzi,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 April 2011,

after considering the observations submitted on behalf of:

— Logstor ROR Polska Sp. z o.o., by T. Konik, and K. Gil, doradcy podatkowi,

— Dyrektor Izby Skarbowej w Katowicach, by G. Pasterczyk, acting as Agent,

— the Polish Government, by M. Szpunar, A. Kramarczyk and A. Kraińska, acting as Agents,

— the European Commission, by M. Afonso and K. Herrmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 4(2) 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').

2 The reference was made in the context of a dispute between Logstor ROR Polska Sp. z o.o. ('Logstor ROR Polska'), established in Zabrze (Poland), and the Dyrektor Izby Skarbowej w Katowicach (Director of the Katowice Tax Chamber; 'the Dyrektor') concerning the payment of a tax, called the 'tax on civil-law transactions', claimed by reason of an amendment of the memorandum and articles of association of Logstor ROR Polska by loans which were granted to it by a company member.

Legal context

EU law

3 According to the first recital of its preamble, the intention of Directive 69/335 is to promote the free movement of capital, which is considered to be a fundamental freedom essential to the creation of an internal market. To that end, as is clear from the sixth to eighth recitals, that directive seeks to harmonise the duty chargeable on

contributions of capital to companies and firms in the European Union by means of the establishment of a single duty on the raising of capital which can be charged only once within the common market and by means of the abolition of all other indirect taxes having the same characteristics as that single duty.

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

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

'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 According to Article 4(2) of the same directive, as amended by Directive 85/303:

'The following transactions may, to the extent that they were taxed at the rate of 1 % as at 1 July 1984, continue to be subject to capital duty:

…

(c) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;

(d) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital;

…'

7 Under Article 7 of Directive 69/335:

'1. 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.

…

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1 %…'

8 The second and third recitals of Directive 85/303, which determined the wording of Directive 69/335 in force at the date of the facts at issue in the main proceedings, stated:

'Whereas the economic effects of capital duty are detrimental to the regrouping and development of undertakings; whereas such effects are particularly harmful in the present economic situation in which there is a paramount need for priority to be given to stimulating investment;

Whereas the best solution for attaining these objectives would be to abolish capital duty; whereas, however, the losses of revenue which would result from such a measure are unacceptable for certain Member States; whereas the Member States must therefore be given the opportunity to exempt from or subject to capital duty all or part of the transactions coming within its scope, it being understood that a single rate of tax must be charged within one and the same Member State'.

9 Directive 69/335 was repealed with effect from 1 January 2009 by Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11).

National law

10 The Republic of Poland acceded to the European Union on 1 May 2004.

The legislation on capital duty in force on 1 July 1984

11 The Law on stamp duty of 19 December 1975 (Dz. U nº 45, item 226), provided that documents for setting up a company by physical and legal persons were subject to a stamp duty. A decree of the Council of Ministers of 16 May 1983 (Dz. U nº 34, item 161), which entered into force on 1 July 1983, defined the subject-matter and the rate of that stamp duty. Article 54(4) thereof provided:

'Loans granted to a company by one of its members or shareholders are also to be regarded as share capital where the total amount of unpaid loans exceeds 50 % of share capital on the date on which the loan is granted.'

12 In that case, the tax rate was 5 % of the value of the loan.

The legislation on capital duty in force between 1 January 2001 and 30 April 2004

13 Between 1 January 2001 and 30 April 2004, the same transactions were taxed under the tax on civil-law transactions, following a degressive rate.

14 Article 1(1) of the Law of 9 September 2000 concerning the tax on civil-law transactions (Dz. U nº 86, item 959; 'the PCC Law 2000') made company memoranda and articles of association and amendments thereof subject to the tax on civil-law transactions, if they gave rise to an increase in the basis of assessment for that tax.

15 Article 1(3) of the PCC Law 2000 provided:

'In the case of memoranda and articles of association, "amendments" shall mean:

…

(4) additional payments, loans granted to the company by members (shareholders), and the free granting of goods or assets by a member (shareholder) to the company.'

16 Article 7(1)(9) of the PCC Law 2000 set a degressive tax rate, according to the amount of the loans, varying from 1 % to 0.5 % of the amount of the transactions. The loan at issue in the main proceedings was then subject to a rate of 0.5 %.

The legislation on capital duty in force between 1 May 2004 and 31 December 2006

17 The Law amending the law on tax on civil-law transactions of 19 December 2003 (Dz. U nº 6, item 42) amended the PCC Law 2000 by exempting from that tax loans granted to a capital company by a member or shareholder. Under Article 9(10)(h) of

the PCC Law 2000, in the version resulting from the uniform text of the latter in force from 1 May 2004 (Dz. U nº 41, item 399):

'The following civil-law transactions are exempted from the tax:

…

(10) loans granted …

(h) by a member (or shareholder) to a capital company;

…'

The legislation concerning capital duty in force between 1 January 2007 and 31 December 2008

18 Article 9(10)(h) of the PCC Law 2000, in the version in force as from 1 May 2004, which exempted loans granted to a capital company by a member or shareholder, was repealed as from 1 January 2007 by Article 2(9)(c), third indent, of the Law of 15 November 2006 amending the Law of rights of succession and the Law on tax on civil-law transactions (Dz. U nº 222, item 1629; 'the PCC Law 2007').

19 Those loan transactions were then regarded as an amendment of the memorandum and articles of association pursuant to Article 1(3)(2) of the PCC Law 2007, and taxed at the uniform rate of 0.5 % pursuant to Article 7(1)(9) of that law.

The legislation concerning capital duty in force as from 1 January 2009

20 The Law of 7 November 2008 (Dz. U nº 209, item 1319) transposed Directive 2008/7 into Polish law and exempted loans granted to a capital company by one of its members or shareholders from the tax on civil-law transactions, pursuant to Article 9(10)(i) of that law.

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

21 On 9 July 2007, Logstor ROR Polska concluded with its shareholder, Logstor Holding A/S, an annex to a loan agreement of 15 September 2004, pursuant to which the amount of a loan granted previously was increased by EUR 2 600 000 to EUR 5 233 000. On 14 August 2007, Logstor ROR Polska concluded with the same shareholder another loan agreement for PLN 8 000 000.

22 In accordance with the Polish legislation in force at the date of those loan transactions, the latter were subjected to the tax on civil-law transactions.

23 Taking the view that, pursuant to Directive 69/335, it was entitled to claim exemption from the tax on civil-law transactions in respect of the transactions in question, Logstor ROR Polska requested the tax administration to determine an overpayment corresponding to the total amount of the tax which it had paid.

24 Following the dismissal of that request, and of the administrative action brought against that dismissal, Logstor ROR Polska brought an action before the Wojewódzki Sąd Administracyjny w Gliwicach (Regional Administrative Court, Gliwice).

25 It is against that background that the Wojewódzki Sąd Administracyjny w Gliwicach decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Does Article 4(2) of [Directive 69/335] entitle a Member State to reintroduce, as from 1 January 2007, capital duty on a loan taken up by a capital company, if the creditor is entitled to a share in the profits of that company, in the case where that Member State has previously waived the charging of that duty as from the date of its accession [to the Union], that is to say, from 1 May 2004?'

The question referred for a preliminary ruling

26 By its question, the referring court asks, in essence, whether Article 4(2) of Directive 69/335, in the version thereof applicable to the dispute in the main proceedings, must be interpreted as precluding a Member State from reintroducing a capital duty on a loan contracted by a capital company, if the creditor is entitled to a share in the profits of that company, in the case where the Member State has previously waived the charging of that duty.

27 As a preliminary observation, it should be noted that the Polish Government has challenged before the Court the presentation of national law made by the referring court.

28 It maintains that it is incorrect to state, as does the referring court, that the Republic of Poland waived the levying of capital duty on loan transactions such as those at issue in the main proceedings at the time of its accession to the Union. According to that government, the exemption of loans granted to capital companies by their shareholders, between 1 May 2004 and 31 December 2006, was designed to avoid double taxation of the same capital, the first time when the shareholder granted the loan to the company and the second at the time when the part of the loan not repaid was converted into shares.

29 It argues, first, that, although loans granted to capital companies by a member or shareholder were exempted from the tax on civil-law transactions between 2004 and 2006, that was not the case with increases in company capital resulting from the conversion of such loans, and that, conversely, the PCC Law 2007 ended the taxation of increases in company capital resulting from the loan of a shareholder or member already subject to the tax on civil-law transactions, at the same time as it made loans granted to capital companies by their members or shareholders again subject to that tax.

30 In that respect, it is sufficient to note that it is not for the Court of Justice, in the context of the judicial cooperation established by Article 267 TFEU, to call back into question or to verify the accuracy of the interpretation of national law made by the referring court (see, to that effect, Case C-449/06 *Gysen* [2008] ECR I-553, paragraph 17, and Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 32).

31 The Court must therefore reply to the question put to it on the basis of the finding made by the referring court that, at the date of its accession to the Union, namely 1 May 2004, the Republic of Poland had waived the levying of the tax at issue in the main proceedings.

32 Under Article 4(2) of Directive 69/335, certain transactions could 'to the extent that they were taxed at the rate of 1 % as at 1 July 1984, continue to be subject to capital duty'.

33 That date, which is taken as the relevant date under Article 4(2) of Directive 69/335, is equally applicable to the Polish Republic. In the case of accession, a reference to a date laid down in Community law, in the absence of a provision to the contrary in the Act of Accession or some other Community document, applies equally to the State which is acceding, even if that date is earlier than the date of its accession (Case C-366/05 *Optimus - Telecomunicações* [2007] ECR I-4985, paragraph 32). As regards the Polish Republic, no provision which differs on that point is to be found either in the Act of Accession or in any other document.

34 In so far as loan transactions such as those at issue in the main proceedings were, on 1 July 1984, subject to taxation as referred to in Article 4(2) of Directive 69/335, the Republic of Poland could therefore, at the time of its accession to the Union, decide to continue to make transactions of that type subject to capital duty.

35 It could not, however, after, as the analysis of national law by the referring court shows, waiving that taxation as from the date of its accession to the Union, decide to reintroduce it subsequently.

36 Article 4(2) of Directive 69/335, the wording of which refers to the concept of continuity, must be interpreted in the light of the objective of limiting or abolishing capital duty set out in the second and third recitals of Directive 85/303. In the light of that objective, it is apparent from the third recital that it was only by reason of the budgetary difficulties they would be faced with if capital duty were abolished that Member States which had not waived the levying of that duty could maintain such taxation.

37 The words 'may … continue to be subject to capital duty', appearing in Article 4(2) of Directive 69/335 must thus be interpreted as implying that, in order to be capable of being subjected to capital duty by Member States, the transactions referred to in that paragraph must not only have been taxable, for the purposes of that provision, by virtue of the national law in force at 1 July 1984, but must also subsequently have been continuously subject to such taxation. Otherwise, the Member State would not be able to demonstrate a loss of receipts necessitating the maintenance of the capital duty.

38 The reference to the date of 1 July 1984 made in Article 4(2) of Directive 69/335 cannot therefore constitute for Member States which, at that date, made the transactions in question subject to capital duty an authorisation to reintroduce such a duty after waiving it, which would go against the wording of that provision and the objective of limiting or abolishing capital duty pursued by the said directive.

39 It follows that a Member State which has, in accordance with Article 7(2) of Directive 69/335, waived subjecting certain transactions to capital duty after 1 July 1984 cannot reestablish such taxation on the same transactions.

40 Therefore, the answer to the question referred is that Article 4(2) of Directive 69/335 must be interpreted as precluding a Member State from reintroducing a capital duty on a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company, where that Member State has previously waived the levying of that tax.

Costs

41 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 (Fourth Chamber) hereby rules:

Article 4(2) 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 precluding a Member State from reintroducing a capital duty on a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company, where that Member State has previously waived the levying of that tax.

[Signatures]