JUDGMENT OF THE COURT (First Chamber)

12 January 2006 *

In Case C-494/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 21 November 2003, received at the Court on 24 November 2003, in the proceedings

Senior Engineering Investments BV

v

Staatssecretaris van Financiën

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

* Language of the case: Dutch.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 May 2005,

after considering the observations submitted on behalf of:

— Senior Engineering Investments BV, by H.T.P.M. van den Hurk and G. Weening, belastingadviseurs,

— the Netherlands Government, by H.G. Sevenster and J. van Bakel, and by M. de Grave, acting as Agents,

— the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2005,

gives the following

Judgment

1 This request for a preliminary ruling relates to the interpretation of Articles 2 and 4 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; hereinafter 'Directive 69/335' or 'the Directive'), and of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2 The ruling was requested in proceedings between Senior Engineering Investments BV (hereinafter 'Senior BV' or the 'subsidiary') and the Staatssecretaris van Financiën concerning the levying of capital duty in respect of a financial contribution paid by its parent company, Senior Engineering Investments Limited (hereinafter 'Senior Limited' or 'the grandparent company') to the 'share premium account' of its subsidiary, Senior Engineering Trading Gesellschaft für Autozulieferteile mbH (hereinafter 'Senior GmbH' or 'the sub-subsidiary').

Legal background

Community legislation

3 As is clear from the first and second recitals in its preamble, the purpose of Directive 69/335 is to promote the free movement of capital, a freedom regarded as essential for the creation of an internal market. Accordingly, it seeks to eliminate fiscal obstacles to the raising of capital, including, in particular, contributions of capital by members or shareholders to companies.

4 To that end, Articles 1 to 9 of Directive 69/335 provide for the collection of a harmonised duty on contributions of capital to capital companies (hereinafter 'capital duty').

5 According to the sixth recital in the preamble to Directive 69/335, capital duty is to be charged once only in the Community and is to be of the same level in all the Member States.

6 Accordingly, pursuant to Article 2(1) of the Directive, '[t]ransactions subject to capital duty shall only be taxable in the Member State in whose territory the effective centre of management of a capital company is situated at the time when such transactions take place'.

7 Article 4 of Directive 69/335 gives a list of transactions (hereinafter 'contributions of capital') which the Member States may or must, as the case may be, subject to capital duty.

8 Thus, Article 4(1)(c) of Directive 69/335 provides that the Member States are to charge capital duty on an 'increase in the capital of a capital company by contribution of assets of any kind'.

9 Pursuant to Article 4(2)(b) of the Directive, the Member States may charge capital duty on 'an increase in the assets of a capital company through the provision of services by a member [or shareholder] 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'.

10 However, under Article 7(2) of Directive 69/335, 'Member States may ... exempt from capital duty all transactions other than those referred to in paragraph 1 [the latter remaining exempt] ...'.

National legislation

11 Article 32(1) of the Wet op de belastingen van rechtsverkeer (Law on the taxation of legal transactions) of 24 December 1970 (Stb. 1970, No 611), as amended by the Law of 13 December 1996 (Stb. 1996, No 652), provides that a tax, referred to as 'capital duty', is to be charged on the raising of share capital for entities established in the Netherlands.

12 Pursuant to Article 34(c) and (d) of that law, the 'raising of share capital' means 'the raising of capital against the issue of profit-sharing certificates, founders' certificates and the like, which give entitlement to a share in the profit or in the proceeds of liquidation' and 'capital payments by a shareholder or a holder of profit-sharing certificates or founders' certificates or the like, without the rights referred to in paragraph (c) being expressly granted'.

13 Article 63 of the Algemene wet inzake rijksbelastingen (General Tax Law) of 2 July 1959 (Stb. 1959, No 301) contains a 'hardship clause' on the basis of which the Minister or the State Secretary of Finance may in certain cases or categories of cases grant relief where unreasonable injustice arises in the application of tax law.

The implementing measures

14 The referring court notes that, at the material time, the Kingdom of the Netherlands followed a policy whereby a contribution by a grandparent company to a sub-subsidiary was, in principle, regarded as a transaction on which both the subsidiary

and the sub-subsidiary were liable to duty. However, if both were established in the Netherlands, by virtue of the hardship clause duty was payable only by the sub-subsidiary.

15 The Netherlands Government observes, however, that in the case of sub-subsidiaries established outside the Netherlands, the Inspector of Taxes may waive collection of capital duty from a subsidiary where capital duty has already been levied abroad on the sub-subsidiary.

16 According to the Netherlands Government, the policy followed by the Kingdom of the Netherlands therefore consists, for reasons of fairness and in order to avoid double taxation within a group of companies, of exempting a subsidiary company in all cases where the sub-subsidiary has already been taxed (in the Netherlands or abroad) and not only in cases where the sub-subsidiary is established in the Netherlands. In both cases, it would be unfair within the meaning of the hardship clause to levy capital duty on the subsidiary.

The main proceedings and the questions referred to the Court of Justice

17 Senior BV is a limited liability company incorporated under Netherlands law whose shares are all held by the English company Senior Limited. In turn, Senior BV holds all the shares in the German company Senior GmbH.

18 On 8 December 1997, the grandparent company, Senior Limited, paid a contribution of DEM 10 071 000 (equivalent to NLG 11 349 000) to its sub-subsidiary, Senior GmbH.

19 In Germany, that transaction did not give rise to any levy payable by Senior GmbH since, on the basis of Article 7(2) of Directive 69/335, Germany had abolished capital duty with effect from 1 January 1992.

20 In the Netherlands, Senior BV was required to pay capital duty of NLG 113 490.

21 Senior BV then brought an action contesting the legality of that taxation. Its action was dismissed by the Inspector of Taxes and by the Gerechtshof te's-Gravenhage (Regional Court of Appeal, The Hague), whereupon Senior BV appealed on a point of law against the latter's decision.

22 Entertaining doubts as to the compatibility with Community law of the Netherlands rules making a (subsidiary) company subject to capital duty in respect of a contribution paid by its parent company (the grandparent company) to its subsidiary (a sub-subsidiary), but on the other hand exempting from that duty a company (a subsidiary company) where the latter's own subsidiary (a sub-subsidiary) is also established in the Netherlands, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 4(2)(b) of ... Directive [69/335] ... permit capital duty to be levied on a company in respect of a direct informal capital contribution made by the parent of that company to a subsidiary of that company and, if so, what circumstances are of relevance in that respect; in particular is it relevant whether or not that company must be regarded, from an economic point of view, as the real recipient ... of that direct informal capital contribution?

(2) Does the freedom of establishment laid down in Article 52 [of the EC Treaty], in conjunction with Article 58 [of the EC Treaty (now, after amendment, Article 48 EC)], prohibit the tax authorities of a Member State from pursuing a policy whereby no capital duty is levied on a company in respect of a direct informal capital contribution made by the parent of that company to a subsidiary of that company, provided that that subsidiary is established in that Member State, and is it relevant in this respect on the assumption that the directive permits capital duty to be levied both on that company and on its subsidiary in a case such as the present whether or not more capital duty has been levied at group level than would have been the case had both that company and its subsidiary been established in the Netherlands?'

The questions referred to the Court of Justice

The first question: chargeability to capital duty (Article 4(1)(c) and (2)(b) of Directive 69/335)

23 By its first question, the national court seeks in essence to ascertain whether, in circumstances such as those of the main proceedings, Directive 69/335 precludes a Member State from levying capital duty on a (subsidiary) capital company in respect of a contribution made by its parent company (the grandparent company) to its subsidiary (a sub-subsidiary).

24 It must be borne in mind in that connection that Articles 1 to 9 of Directive 69/335 provide for the levying of harmonised capital duty on contributions to the capital of companies.

25 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 (see, in particular, in relation to a financial contribution paid to the subsidiaries of a company which increased its capital, Case C-339/99 *ESTAG* [2002] ECR I-8837, paragraphs 44 to 47).

26 Furthermore, it follows from the sixth recital in the preamble to and Article 2 of Directive 69/335 that duty on the raising of capital should be charged only once (see, to that effect, in particular, Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, paragraph 19, and Case C-236/97 *Codan* [1998] ECR I-8697, paragraph 27).

27 In the main proceedings, it is clear from the account of the facts given by the referring court that the contribution in question was paid to the sub-subsidiary company (Senior GmbH) in the context of a contribution in its favour. On the other hand, nothing in the account of the facts permits the inference that the circumstances of the main proceedings constitute an exceptional situation in which another company, such as, for example, the subsidiary (Senior BV) should be regarded as being the 'real recipient' of that contribution.

28 It is therefore necessary to consider whether, under Directive 69/335, the contribution in question is subject to capital duty payable by the sub-subsidiary (Senior GmbH). If that were the case, that same contribution could not be the subject of duty levied on another company, in this case the subsidiary (Senior BV).

29 In that connection, Article 4 of Directive 69/335 specifies the transactions on which the Member States may or must, according to the category, impose capital duty (see, to that effect, in particular, Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 12, and Case C-152/97 *Agas* [1998] ECR I-6553, paragraphs 19 and 20).

30 The transaction at issue in the main proceedings is a financial contribution paid by a grandparent company (Senior Limited) to its sub-subsidiary (Senior GmbH) and therefore it could, in principle, be analysed in the light either of Article 4(1)(c) of Directive 69/335 or of Article 4(2)(b) thereof.

31 Article 4(1)(c) of the Directive provides for the levying of capital duty in respect of an increase of the capital of a capital company by contribution of assets of any kind.

32 Article 4(2)(b) of the Directive provides that the Member States may subject to capital duty an increase in the assets of a capital company through the provision of services by a member (or a shareholder) which do not entail an increase in the company's capital, but which may increase the value of the company's shares.

33 A comparison of those two provisions prompts the finding, in line with the view put forward by the Netherlands Government, that the 'increase in the capital' referred to in Article 4(1)(c) of Directive 69/335 means a formal increase of a company's capital by means either of an issue of new shares or by an increase in the nominal value of the existing shares (see, to that effect, Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771, paragraph 15, and Case 36/86 *Dansk Sparinvest* [1988] ECR 409, paragraph 13).

34 On the other hand, and to the extent to which the assets of the company are defined as all the property which the members have contributed, together with any increase in its value (see, to that effect, Case C-38/88 *Siegen* [1990] ECR I-1447, paragraph 12), the 'increase in the assets' within the meaning of Article 4(2)(b) of the Directive includes, in principle, every kind of increase in the net assets of a capital company. Thus, the Court has described as an 'increase in the assets' within the meaning of that provision, for example, a transfer of profits (see Case C-49/91 *Weber Haus* [1992] ECR I-5207, paragraph 10), an interest-free loan (see, in particular, Case C-392/00 *Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken* [2002] ECR I-7397, paragraph 18), an absorption of losses (see *Siegen*, paragraph 13), and the waiver of a claim (Case C-15/89 *Deltakabel* [1991] ECR I-241, paragraph 12).

35 In the main proceedings, the contribution in question was paid to the share premium account of the sub-subsidiary company (Senior GmbH). However, in so far as a payment to the share premium account does not involve any 'increase in the capital', that contribution does not fall within the scope of Article 4(1)(c) of Directive 69/335.

36 The contribution in question does fall, however, within the scope of Article 4(2)(b) of the Directive.

37 First, the payment of the financial contribution in question entailed an 'increase in the assets' of the sub-subsidiary (Senior GmbH).

38 Second, that contribution was one that 'may increase the value of the company's shares'. Following that contribution, the shares in the sub-subsidiary (Senior GmbH) are de facto more valuable.

39 Third, the contribution in question is a 'provision of services by a member'. It is true that that contribution was paid not by a member of Senior GmbH (Senior BV) but by the parent company of the latter (Senior Limited), and thus by a member of a member. However, it must be borne in mind that the Court has adopted, with regard to the origin of contributions, an informal approach based on the real appropriation of the contribution (see, to that effect, *Weber Haus*, paragraphs 11 and 13; *ESTAG*, paragraphs 37 to 39 and 41; and Case C-71/00 *Develop* [2002] ECR I-8877, paragraphs 25 to 29). As the contribution in question was paid by the grandparent company (Senior Limited) to the sub-subsidiary (Senior GmbH) in order to increase the value of the shares in the latter, and as that increase was primarily in the interests of its sole member, namely Senior BV, it must be held that that contribution must be attributed to the latter, that is to say Senior BV. It is therefore a 'provision of services by a member' within the meaning of Article 4(2)(b) of Directive 69/335.

40 It follows that, under Directive 69/335, the contribution at issue in the main proceedings is subject to capital duty payable by the sub-subsidiary (Senior GmbH).

41 Given that, pursuant to Article 2(1) of Directive 69/335, read in conjunction with the sixth recital in its preamble, a contribution to a company may be taxed only once (in the Community), that contribution cannot be subject to taxation a second time, payable on that occasion by the subsidiary (Senior BV).

42 In that connection, it is of little importance that the contribution in question may possibly have also increased the assets of the subsidiary (Senior BV). It must be pointed out, as the Advocate General observed in point 21 of his Opinion, that such an increase cannot constitute anything more than an automatic and incidental

economic repercussion of the contribution made to the sub-subsidiary company (Senior GmbH). It is not therefore attributable to a second separate contribution which could, as such, be subject to tax.

43 Similarly, it is of little importance that the Member State with authority under Article 2(1) of Directive 69/335 to tax the sub-subsidiary (Senior GmbH), namely the Federal Republic of Germany, did not in fact do so, because capital duty has been abolished there since 1 January 1992. The Member States are free, under Article 7(2) of Directive 69/335, to exempt contributions to companies from capital duty, without such exemption entailing the consequence that another Member State is entitled to tax them. On the contrary, Directive 69/335 favours and encourages both specific exemptions from capital duty (Articles 7(1) and (3), 8 and 9) and complete abolition (Article 7(2)). The Directive cannot therefore be interpreted as enabling a Member State to benefit, so as to increase its tax revenue, from the fiscal moderation of another Member State.

44 In view of the foregoing, the answer to be given to the first question must be that, in circumstances such as those of the main proceedings, Article 4(2)(b) of Directive 69/335, read in conjunction with Article 2(1) thereof and the sixth recital in its preamble, precludes a Member State from levying duty on a (subsidiary) capital company in respect of a contribution paid by its parent company (the grandparent company) to its subsidiary (a sub-subsidiary).

The second question: the right to freedom of establishment (Article 52 of the EC Treaty)

45 In view of the answer given to the first question, it is unnecessary to reply to the second.

Costs

46 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 of the main proceedings, Article 4(2)(b) 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, read in conjunction with Article 2(1) thereof and the sixth recital in its preamble, precludes a Member State from levying duty on a (subsidiary) capital company in respect of a contribution paid by its parent company (the grandparent company) to its subsidiary (a sub-subsidiary).

[Signatures]