Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

3 October 2013 *

(Fourth Directive 78/660/EEC — Article 2(3) — Principle that a true and fair view must be given — Article 2(5) — Obligation to depart from that principle — Article 32 — Valuation method based on historical cost — Purchase price manifestly lower than the real value)

In Case C-322/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Belgium), made by decision of 1 June 2012, received at the Court on 4 July 2012, in the proceedings

État belge

v

GIMLE SA,

THE COURT (Tenth Chamber),

composed of A. Rosas, President of the Chamber, E. Juhász and C. Vajda (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— GIMLE SA, by R. Tournicourt and F. Lettany, avocats,

— the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the European Commission, by G. Braun and J. Hottiaux, acting as Agents,

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

gives the following

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principle that a true and fair view must be given of companies' assets, liabilities, financial position and profit or loss, contained in Article 2(3) to (5) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article [44(2)(g) EC] on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11; 'the Fourth Directive').

2 The request has been made in proceedings between État belge and GIMLE SA ('GIMLE') concerning the treatment, for accounting purposes, of the acquisition of shares which were resold, one month after their acquisition, for a price 3 400 times their purchase price.

Legal context

European Union law

3 Article 2(3) to (5) of the Fourth Directive provides:

'3. The annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profit or loss.

4. Where the application of the provisions of this Directive would not be sufficient to give a true and fair view within the meaning of paragraph 3 above, additional information must be given.

5. Where in exceptional cases the application of a provision of this Directive is incompatible with the obligation laid down in paragraph 3, that provision must be departed from in order to give a true and fair view within the meaning of paragraph 3. Any such departure must be disclosed in the notes on the accounts together with an explanation of the reasons for it and a statement of its effect on the assets, liabilities, financial position and profit or loss. The Member States may define the exceptional cases in question and lay down the relevant special rules.'

4 Article 31(1)(c) of the directive provides:

'The Member States shall ensure that the items shown in the annual accounts are valued in accordance with the following general principles:

…

(c) valuation must be made on a prudent basis, and in particular:

(aa) only profits made at the balance sheet date may be included,

...'

5 Article 32 of that directive states:

'The items shown in the annual accounts shall be valued in accordance with Articles 34 to 42, which are based on the principle of purchase price or production cost.'

Belgian law

6 According to the referring court, the first paragraph of Article 3, Article 4 and the first paragraph of Article 16 of the Royal Decree of 8 October 1976 concerning the annual accounts of undertakings, in the version applicable to the main proceedings ('the Royal Decree'), transpose into domestic law Article 2(3) to (5) of the Fourth Directive.

7 Under the first paragraph of Article 3 of the Royal Decree, the annual accounts must give a true and fair view of the undertaking's assets, liabilities, financial position and profit or loss.

8 Article 4 of the Royal Decree states that the annual accounts are to be drawn up in accordance with the provisions of that decree and that, if the application of those provisions is not sufficient for the purpose of compliance with Article 3 of the decree, additional information must be provided in the notes on the annual accounts.

9 According to the first paragraph of Article 16 of that decree, in exceptional cases in which, as a result of the application of the valuation rules laid down in the chapter containing that provision, it is not possible to comply with Article 3 of the decree, those rules must be departed from and Article 3 applied.

10 Article 20 of the Royal Decree provides that, without prejudice to the application of Articles 16, 27, 27a and 34 of that decree, assets are to be valued at their acquisition value and entered on the balance sheet as having that value, after allowing for deductions for depreciation and for any reduction in related values, and that 'acquisition value' means either the acquisition price, as defined in Article 21, the production cost, as defined in Article 22, or the value at which it is transferred, as defined in Article 23 of the decree.

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

11 The facts as they appear from the order for reference may be summarised as follows.

12 GIMLE, a public limited company constituted under Belgium law, was formed on 26 November 1998 by Mr Sjöwall and Ms Larsson, both of whom are Swedish nationals and resident in the United Kingdom. The company objects of GIMLE include the acquisition of shareholdings in all kinds of companies and the management of such companies.

13 On 27 November 1998, GIMLE acquired 50 shares in TV Shop Europe AB, a company constituted under Swedish law, which was also founded by Mr Sjöwall, for 5 000 Swedish krona (SEK), that is SEK 100 per share. On 4 January 1999, 38 days after their acquisition, GIMLE sold those shares to Electronic Retailing AB, a company constituted under Swedish law, at a price of SEK 17 000 000, that is, at SEK 340 000 per share. As a result of that sale, GIMLE registered, for accounting purposes, a capital gain of 74 776 696 Belgian francs (BEF) (EUR 1 853 668), corresponding to the difference between the sale price and the acquisition price of those shares.

14 However, for tax purposes, that type of capital gain from a sale of shares benefited from an exemption in Belgium, so that GIMLE did not declare that capital gain as taxable income in its declaration relating to corporation tax under the income tax assessment for the 2000 tax year (1999 income).

15 By reassessment notice of 19 November 2002, the tax authorities nevertheless took the view that GIMLE had received taxable income due to the capital gain realised on the purchase of the shares at issue in the main proceedings, that is 'as a result of the output of monetary assets and their replacement by shares whose real value is higher than the price paid'. In doing so, the tax authorities presumed that the real value of the shares, at the time of their acquisition on 27 November 1998, did

not correspond to their acquisition price (SEK 100 per share), but instead to their resale price on 4 January 1999 (SEK 340 000 per share). Consequently, the tax authorities made that capital gain of BEF 74 776 696 (EUR 1 853 668) subject to income tax.

16 When GIMLE brought an action against the decision of 18 July 2003, by which the tax authorities had rejected its objection, the tribunal de première instance de Bruxelles (Court of First Instance, Brussels) declared that action to be admissible and well founded. Consequently, that court ordered that the amount of the disputed tax be reduced and ordered the État belge to reimburse all sums unduly received by it, together with default interest.

17 The appeal brought before the cour d'appel de Bruxelles (Court of Appeal, Brussels) by the État belge against the judgment given at first instance was dismissed. The cour d'appel de Bruxelles did not call into question the validity of the factual assessment carried out by the État belge, according to which the acquisition price of the shares at issue in the main proceedings was manifestly lower than their real value, which corresponded to the sale price obtained 38 days later. However, that court found that that assessment was irrelevant, since, under the first paragraph of Article 3, Article 4 and the first paragraph of Article 16 of the Royal Decree, GIMLE had an obligation to enter its shares in the accounts not at their real value, but at their historical cost of acquisition. In particular, that court held that Article 16 of the decree obliges undertakings to set aside historical cost of acquisition in favour of real cost only in 'exceptional' cases, and that the second paragraph of Article 4 of the decree enables an undertaking to give a true and fair view of its assets by providing, in the notes on its annual accounts, 'additional information', without, however, departing from the uniform rule that all assets are to be valued by reference to the historical cost. Consequently, the cour d'appel de Bruxelles upheld the judgment at first instance, finding that the État belge was incorrect to take account of the capital gain of BEF 74 776 696 for the purpose of calculating the tax due by GIMLE.

18 The État belge appealed in cassation against the judgment delivered by the cour d'appel de Bruxelles, arguing that the first paragraph of Article 3, Article 4 and the first paragraph of Article 16 of the Royal Decree not only state that additional information is to be provided in the notes on the annual accounts, but also require a derogation from the rule that assets are to be entered into the accounts at their acquisition cost where, as in the case in the main proceedings, the price paid clearly does not reflect the real value of the assets concerned, thus giving a distorted view of the undertaking's assets, financial position and profit or loss.

19 Considering that the État belge's appeal in cassation required an interpretation of Articles 2(3) to (5) of the Fourth Directive, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 2[(3) to (5)] of [the Fourth Directive] be interpreted as not only providing that additional information must be provided in the notes on the annual accounts but also requiring that – where the acquisition cost clearly does not reflect the real value of the assets concerned, thus giving a distorted view of the undertaking's assets, liabilities, financial position and profit or loss – the rule that assets are to be entered in the accounts at their acquisition cost must be departed from and such assets immediately recognised as having their resale value, if that appears to be the real value?'

Consideration of the question referred

Observations submitted to the Court

20 Written observations have been submitted to the Court by GIMLE, the Belgian and German Governments and the European Commission. GIMLE, the German Government and the Commission consider that the reply to the question referred should be in the negative. Only the Belgian Government submits the opposite.

21 GIMLE and the German Government state that the valuation method laid down in Article 32 of the Fourth Directive is based on the historical cost of assets, represented by the purchase price or production cost thereof. They add that that method can be derogated from only in the limited situations set out in Article 33 of that directive.

22 The Commission, referring to Case C-234/94 *Tomberger* [1996] ECR I-3133, paragraph 17, and Case C-275/97 *DE + ES Bauunternehmung* [1999] ECR I-5331, paragraph 26, points out that the principle that a true and fair view must be given, contained in Article 2(3) of the Fourth Directive, is the primary objective of the directive. The interested parties which submitted observations to the Court however disagree as to the scope of Article 2(5) of that directive, which imposes an obligation to depart from a provision of that directive if, in exceptional cases, it is incompatible with the principle that a true and fair view must be given.

23 GIMLE, the German Government and the Commission claim that the purchase of an asset for a price lower than its real value cannot be considered to be an 'exceptional case', within the meaning of Article 2(5) of the Fourth Directive, justifying a derogation from the principle of valuation on the basis of historical cost contained in Article 32 of that directive. In this respect, GIMLE submits that the choice of the European Union legislature of the method based on historical cost implies that company accounts provide valuations which rarely correspond to the real value of assets. The German Government adds that that method inevitably results in the appearance of sometimes significant hidden assets, where the acquisition price is lower than the real value of the asset, but that such hidden assets are consistent with the principle of making valuations on a prudent basis referred to in Article 31(1)(c) of that directive.

24 The Belgian Government, on the contrary, takes the view that the concept of 'exceptional case', referred to in Article 2(5) of the Fourth Directive, covers the situation where the acquisition price of an asset is, as in the main proceedings, manifestly lower than its real value, since the use of the acquisition price gives a distorted view of the financial situation of the undertaking. In this respect, the Belgian Government refers, by analogy, to paragraph 32 of *DE + ES Bauunternehmung*, in which the Court found that the 'exceptional cases' referred to in Article 31(2) of the Fourth Directive are those in which a separate valuation would not give the truest and fairest possible view of the actual financial position of the company concerned.

Findings of the Court

25 By its question submitted for a preliminary ruling the referring court asks, in essence, whether the principle, set out in Article 2(3) to (5) of the Fourth Directive, that a true and fair view must be given requires that the principle of valuation of assets on the basis of their acquisition price or their production cost, contained in Article 32 of that directive, be departed from in favour of a valuation on the basis of their real value, where the acquisition price or the production cost of those assets is manifestly lower than their real value.

26 It is apparent from the order for reference that the main proceedings concern the treatment, for accounting purposes, of the acquisition of shares which were resold, one month after their acquisition, for a price 3 400 times their purchase price.

27 It is also apparent from that decision that the main proceedings are of a fiscal nature, in so far as an entry of shares in the accounts at their real value at the time of their acquisition would enable the Belgian tax authorities to tax the company concerned on the basis of the capital gain made on the difference between the real value of those shares and their acquisition price.

28 In this respect, the Court has already stated that the Fourth Directive is not designed to lay down the conditions in which the annual accounts of companies may or must serve as a basis for the determination by the tax authorities of the Member States of the basis for assessment and the amount of taxes, such as the corporate tax at issue in the main proceedings. However, it is in no way excluded that annual accounts might be used by Member States as a reference base for tax purposes (Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 70), and no provision of the Fourth Directive precludes Member States from correcting, for tax purposes, the effects of the accounting rules in that directive, in order to determine a taxable profit closer to the economic reality.

29 The Court notes that the Fourth Directive is intended to ensure the coordination of national provisions on the structure and content of annual accounts and reports and methods of valuation, for the purposes of protecting members and third parties. To that end, according to the third recital in its preamble, it is designed only to establish minimum conditions as to the extent of the financial information to be made available to the public (*BIAO*, paragraph 69).

30 The Fourth Directive bases that coordination of the content of annual accounts on the principle that a true and fair view must be given, compliance with which is its primary objective (*Tomberger*, paragraph 17; *DE + ES Bauunternehmung*, paragraph 26; and *BIAO*, paragraph 72). According to that principle, contained in Article 2(3) to (5) of that directive, annual accounts must give a true and fair view of the assets, financial position and the profit and loss of the company.

31 Article 2(3) to (5) of the Fourth Directive, which lays down the principle that a true and fair view must be given, forms part of Section 1 of that directive, entitled 'General provisions'. Section 7 of that directive, entitled 'Valuation rules', defines the rules for valuation of the items shown in the annual accounts, among which are the general principles set out in Article 31 of the directive.

32 The Court has already had occasion to rule that the application of the principle that a true and fair view must be given must, as far as possible, be guided by the general principles contained in Article 31 of the Fourth Directive, within which the principle of making valuations on a prudent basis set out in Article 31(1)(c) is of particular importance (*Tomberger*, paragraph 18).

33 In accordance with the provisions of Article 31(1)(c) of the Fourth Directive, which states the principle of making valuations on a prudent basis, taking account of all elements – profits made, charges, income, liabilities and losses – which actually relate to the financial year in question ensures observance of the requirement of a true and fair view (*Tomberger*, paragraph 22, and *BIAO*, paragraph 123). In particular, Article 31(1)(c)(aa) provides that only profits made at the balance-sheet date may be included.

34 The principle that a true and fair view must be given must also be understood in the light of the principle contained in Article 32 of the Fourth Directive, pursuant to which the items shown in the annual accounts are to be valued based on the purchase price or production cost.

35 Under that provision, the true and fair view which the annual accounts of a company must give is based on a valuation of the assets not on the basis of their real value, but on the basis of their historical cost.

36 It is true that Article 2(5) of the Fourth Directive provides that where, in exceptional cases, the application of a provision of that directive is incompatible with the obligation laid down in Article 2(3), that provision must be departed from in order to give a true and fair view within the meaning of paragraph 3.

37 Under Article 2(5) of that directive, it is therefore possible that, in exceptional cases, Article 32 of the directive, which requires a valuation of the assets by acquisition price or production cost, must be departed from where the use of that method would give a distorted view of the companies' assets, financial position and profit or loss.

38 However, it must be stated that, as GIMLE, the German Government and the Commission point out, the undervaluation of assets in company accounts cannot, in itself, be considered to be an 'exceptional case' within the meaning of Article 2(5) of the Fourth Directive.

39 The possibility that certain assets would be undervalued in company accounts where their acquisition value is lower than their real value is merely the necessary corollary of the choice made by the European Union legislature, in Article 32 of the Fourth Directive, to opt for a valuation method based not on the real value of the assets but on their historical cost.

40 Furthermore, as the German Government states, the undervaluation of certain assets, such as shares, in a company's accounts, because of their valuation on the basis of acquisition price or production cost, is consistent with the principle of making valuations on a prudent basis laid down in Article 31(1)(c) of the Fourth Directive. In particular, the valuation of such assets at their real value would reveal a capital gain in the company accounts, corresponding to the difference between the real value and the acquisition value of those assets, contrary to Article 31(1)(c)(aa) of that directive, according to which only profits made at the balance sheet date may be included.

41 Furthermore, the Commission correctly points out that the État belge had not, at the time of the transactions at issue in the main proceedings, adopted the optional provisions under Article 2(5) or Article 33 of the Fourth Directive. The Commission also correctly states that a company which is certain to make a large profit due to commitments entered into regarding the future resale of an asset must, under Article 2(4) of that directive, give additional information in that regard.

42 In the light of all of the foregoing considerations, the answer to the question referred is that the principle that a true and fair view must be given, set out in Article 2(3) to (5) of the Fourth Directive, does not permit the principle of valuation of assets on the basis of their acquisition price or their production cost, contained in Article 32 of that directive, to be departed from in favour of a valuation on the basis of their real value, where the acquisition price or the production cost of those assets is manifestly lower than their real value.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Tenth Chamber) hereby rules:

The principle that a true and fair view must be given, set out in Article 2(3) to (5) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article [44(2)(g) EC] on the annual accounts of certain types of companies, does not permit the principle of valuation of assets on

the basis of their acquisition price or their production cost, contained in Article 32 of that directive, to be departed from in favour of a valuation on the basis of their real value, where the acquisition price or the production cost of those assets is manifestly lower than their real value.

[Signatures]