Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 February 2012 *

(Taxation — Indirect taxes on the raising of capital — Capital duty levied on capital companies — Obligation on a Member State to take account of directives which were no longer in force at the time of that State's accession — Exclusion, from the amount on which capital duty is charged, of the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty)

In Case C-372/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 26 May 2010, received at the Court on 26 July 2010, in the proceedings

Pak-Holdco sp. z o.o.

v

Dyrektor Izby Skarbowej w Poznaniu,

THE COURT (Fourth Chamber),

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

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2011,

after considering the observations submitted on behalf of:

— Pak-Holdco sp. z o.o., by N. Półtorak, radca prawny, and by L. Mazur, doradca podatkowy,

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

— the European Commission, by L. Lozano Palacios and K. Herrmann, acting as Agents,

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

gives the following

* Language of the case: Polish.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first indent of Article 5(3) 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) and Article 7(1) of Directive 69/335, as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23).

2 The reference has been made in proceedings between Pak-Holdco sp. z o.o. ('Pak-Holdco') and the Dyrektor Izby Skarbowej w Poznaniu (Director of the Tax Chamber in Poznań) concerning taxation of civil-law transactions.

Legal context

European Union legislation

3 Under Article 5(3) of Directive 69/335:

'The amount on which the duty is charged in the case of an increase in capital shall not include:

— the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty;

…'.

4 Article 7(1) of Directive 69/335 has been amended on numerous occasions. The original version of that provision was worded as follows:

'Until the entry into force of the provisions to be adopted by the Council in accordance with paragraph 2:

(a) the rate of capital duty may not exceed 2% or be less than 1%;

(b) this rate shall be reduced by 50% or more when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business, to one or more capital companies which are in the process of being formed or which are already in existence.

This reduction shall be subject to the condition that:

— the consideration for the contributions shall consist exclusively of the allocation of shares in the company or companies, although Member States shall have the right to extend application of the reduction to cases in which the consideration for contributions consists of the allocation of shares in the company or companies together with a payment in cash not exceeding 10% of the nominal value of the shares;

— the companies taking part in the transaction have their effective centre of management or their registered office within the territory of a Member State;

…'

5 Council Directive 73/79/EEC of 9 April 1973 varying the field of application of the reduced rate of capital duty provided for in respect of certain company reconstruction operations by Article 7(1)(b) of the Directive concerning indirect taxes on the raising of capital (OJ 1973 L 103, p. 13) amended Article 7(1) of Directive 69/335 by inserting a subparagraph (bb) in the following terms:

‘(bb) the rate of capital duty may be reduced by 50% or more where a capital company which is in the process of being formed or which is already in existence acquires shares representing at least 75% of the issued share capital of another capital company. Where the said percentage is reached by means of two or more transactions, the reduced rate shall apply only to the transaction whereby this percentage is reached and to subsequent transactions.

…’

6 Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15) stated:

‘Article 1

The rate of the capital duty provided for in Article 7 of [Directive 69/335, as amended by Directive 73/79] shall, with effect from 1 January 1976, be 1%.

Article 2

The reduced rates provided for in Article 7(1)(b) and (bb) of the same directive [as amended] shall, with effect from 1 January 1976, be any rate between 0% and 0.50%.

…’

7 Lastly, Article 1(2) of Directive 85/303 amended Article 7 of Directive 69/335, providing as follows:

‘Article 7 [of Directive 69/335] is replaced by the following:

“Article 7

(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.

The Hellenic Republic shall determine which transactions it shall exempt from capital duty.

…”’

8 In addition, Directive 85/303 repealed Directive 73/80.

9 Directive 69/335 was repealed by Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11). However, that repeal took place after the events giving rise to the dispute in the main proceedings in the present case.

National legislation

10 Article 1(1)(3)(d) of the Law of 19 December 1975 on stamp duty (*Dziennik Ustaw* 1975 No 45, item 226), in the version applicable to the dispute in the main proceedings, states:

'Stamp duty shall be levied:

…

(3) on the following acts confirming civil-law transactions:

…

(d) transactions confirming the establishment of a company by physical and legal persons which do not carry out their activities within the framework of the planned economy.'

11 Paragraph 54(1) of the Order of the Council of Ministers of 16 May 1983 on stamp duty (*Dziennik Ustaw* 1983 No 34, item 161), in the version applicable to the dispute in the main proceedings ('the Order on stamp duty'), states:

'The stamp duty to be levied on the memorandum and articles of association, as applied to the amount on which duty is charged, shall be:

(1) 10% on contributions of immovable property or permanent usufruct,

(2) 5% on all other contributions.'

12 Paragraph 54(3) of the Order on stamp duty states:

'The amount on which stamp duty is calculated shall be:

…

(2) in the case of an increase in share capital, the amount of that increase in share capital.'

13 Under Paragraph 54(4) of the Order on stamp duty:

'Share capital shall be taken to mean all contributions by shareholders, with the exception of contributions in kind, as well as subsidies within limited liability companies.'

14 Article 1(1) of the Law on the taxation of civil-law transactions of 9 September 2000, as amended, (*Dziennik Ustaw* 2005, No 41, item 399) ('the PCC Law') states:

'1. Tax shall be chargeable on:

(1) the following civil-law transactions:

…

(k) the memorandum and articles of association (founding documents),

(2) amendments to the agreements referred to in subparagraph 1, if they give rise to an increase in the basis of assessment for the taxation of civil-law transactions …'.

15 Article 1(3)(2) of the PCC Law states:

‘In the case of the memorandum and articles of association, the following shall be considered amendments to such documents:

…

(2) in the case of a capital company: a contribution of capital to the company or an increase in capital contributed to the company, the value of which gives rise to an increase in the share capital, and subsidies.’

16 Article 6(1)(8) of the PCC Law states:

‘The basis of assessment shall be:

…

(8) in the case of the memorandum and articles of association:

…

(b) in the event of amendment to such documents — the value of invested capital increasing the company’s assets or the value by which the share capital is increased.’

17 Under Article 7(1)(9) of the PCC Law:

‘The following rates of tax shall apply:

…

(9) on the memorandum and articles of association: 0.5%.’

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

18 Elektrownia Pątnów II sp. z o.o. (‘EP II’) and Pak-Holdco are two subsidiaries of Zespół Elektrowni Pątnów Adamów Konin SA (‘ZEPAK’).

19 On 17 August 2005, ZEPAK transferred all of its shares in EP II to Pak-Holdco by contributing those shares as assets in kind to that company. On the following day, Pak-Holdco increased its share capital by the value of that contribution in kind, increasing the value of ZEPAK’s shares in Pak-Holdco by the amount of those previously held by ZEPAK in EP II. Since that transaction constituted an amendment to Pak-Holdco’s memorandum and articles of association within the meaning of the PCC Law, it was made subject to the tax on civil-law transactions, at a rate of 0.5%.

20 On 31 August 2006, Pak-Holdco asked the tax authority to confirm that there had been an overpayment of tax on that civil-law transaction of a value equal to the amount of duties paid pursuant to the provisions of the PCC Law, on the ground that that Law was in conflict with Directive 69/335, Article 7(1) of which, construed in conjunction with Directives 73/79, 73/80 and 85/303, prohibited subjection of the transaction in question to capital duty, and that it was therefore necessary to apply, in the first instance, Directive 69/335. In addition, Pak-Holdco took the view that the first indent of Article 5(3) of that directive excludes, from the amount on which duty is charged, the contribution, by another company, of assets which have already been subjected to capital duty.

21 Following the tax authority's refusal to confirm that an overpayment had been made, Pak-Holdco brought an action before the Wojewódzki Sąd Administracyjny w Poznaniu (Regional Administrative Court, Poznań), which upheld the tax authority's decision. That court based its judgment on, inter alia, the fact that Directives 73/79 and 73/80 had been repealed prior to the Republic of Poland's accession to the European Union and that they could not, for that reason, produce legal effects in relation to the appellant. In addition, it ruled that the first indent of Article 5(3) of Directive 69/335 was not applicable to the facts of the case.

22 Hearing the appeal in cassation, the Naczelny Sąd Administracyjny (Supreme Administrative Court) is unsure whether Article 7(1) of Directive 69/335, as amended by Directive 85/303, should be given a literal interpretation or a historical one. In the view of the Naczelny Sąd Administracyjny, the case-law of the Court of Justice is unclear. Although the Court ruled against a historical interpretation of that provision in its judgment in Case C-366/05 *Optimus-Telecomunicações* [2007] ECR I-4985, at paragraph 27, it did, by contrast, apply a historical interpretation in its judgment in Case C-397/07 *Commission* v *Spain* [2009] ECR I-6029, at paragraph 21.

23 In those circumstances, the Naczelny Sąd Administracyjny decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In interpreting Article 7(1) of Directive 69/335 …, [as amended by Directive 85/303,] must a national court take account of the provisions of amending directives, in particular Directives 73/79 … and 73/80 …, even though those directives were no longer in force when the Republic of Poland acceded to the European Union?

(2) If the answer to Question 1 is in the negative, does the exclusion of the assets of a capital company from the amount on which capital duty is charged, as laid down in the first indent of Article 5(3) of Directive 69/335 …, concern only the assets of a capital company which has had an increase in capital?'

Consideration of the questions referred

Question 1

24 By its first question, the referring court asks, in essence, whether, in the case of a State such as the Republic of Poland, which acceded to the European Union on 1 May 2004, Article 7(1) of Directive 69/335, as amended by Directive 85/303, is to be interpreted to mean that the mandatory exemption provided for in that provision applies only to those transactions coming within the scope of that directive (as amended) which, on 1 July 1984, were exempted, in that State, from capital duty or which were subjected to that duty at a reduced rate of 0.50% or less.

25 In order to answer that question, account must be taken, with regard to the interpretation and application of Directive 69/335, of the particular situation of a State such as the Republic of Poland, which became a member of the European Union on 1 May 2004.

26 It follows, in the first place, from that fact that Directive 69/335 was not applicable in that State before that date. Any measures relating to the taxation or exemption from taxation of transactions falling within the definition of the raising of capital were adopted within the Polish legal system, before the date referred to above, solely on the basis of national law (see *Optimus-Telecomunicações*, paragraph 26).

27 The second consequence of that fact is that, for the purposes of the interpretation and application of Directive 69/335 as it relates to the Republic of Poland, a 'historical' interpretation of the objectives of that directive cannot affect the interpretation of that directive as it applied after the accession of that State (see *Optimus-Telecomunicações*, paragraph 27).

28 The first subparagraph of Article 7(1) of Directive 69/335, as amended by Directive 85/303, sets out a clear and unconditional obligation, on the part of Member States, to exempt from capital duty transactions which, on 1 July 1984, were exempted or taxed at a rate of 0.50% or less. That obligation, the meaning of which is unambiguous, was also binding on the Republic of Poland as from 1 May 2004 (see, to that effect, *Optimus-Telecomunicações*, paragraph 30).

29 That interpretation corresponds not only to what is clearly the letter of Article 7(1), as amended by Directive 85/303, but also to the spirit and primary objective of Directive 69/335, which was to minimise the effects of capital duty on the free movement of capital as far as possible (see *Optimus-Telecomunicações*, paragraph 31).

30 Lastly, it must be observed that the date of 1 July 1984, which is taken as the relevant date under Article 7(1) of Directive 69/335, as amended by Directive 85/303, is equally applicable to the Republic of Poland. In the case of accession to the European Union, a reference to a date laid down in European Union law, in the absence of a provision to the contrary in the Act of Accession or any other European Union document, applies equally to the State which is acceding, even if that date is earlier than the date of its accession. So far as the Republic of Poland is concerned, no provision which differs on that point is to be found either in the Act of Accession of that State or in any other European Union document (see, to that effect, *Optimus-Telecomunicações*, paragraph 32, and Case C-212/10 *Logstor ROR Polska* [2011] ECR I-5453, paragraph 33).

31 It follows that, in the case of a State such as the Republic of Poland, which acceded to the European Union on 1 May 2004, in the absence of derogating provisions in the Act of Accession of that State to the European Union or in any other European Union document, Article 7(1) of Directive 69/335, as amended by Directive 85/303, must be interpreted to mean that the mandatory exemption provided for in that provision applies only to those transactions coming within the scope of that directive, as amended, which, on 1 July 1984, were exempted, in that State, from capital duty or were subject to that duty at a reduced rate of 0.50% or less (see, to that effect, *Optimus-Telecomunicações*, paragraph 33).

32 That interpretation is not called into question by paragraph 21 of the judgment in Case C-397/07 *Commission* v *Spain*, in which the Court merely defined the scope of the complaints which had been raised by the European Commission in the case giving rise to that judgment by specifying the transactions which were, as from 1 January 1986 (the date of the Kingdom of Spain's accession to the European Communities), mandatorily exempted from capital duty.

33 It follows that the answer to the first question is that, in the case of a State such as the Republic of Poland, which acceded to the European Union on 1 May 2004, in the absence of derogating provisions in the Act of Accession of that State to the European Union or in any other European Union document, Article 7(1) of Directive 69/335, as amended by Directive 85/303, must be interpreted to mean that the mandatory exemption provided for in that provision applies only to those transactions coming within the scope of that directive, as amended, which, on 1 July 1984, were exempted, in that State, from capital duty or were subject to that duty at a reduced rate of 0.50% or less.

Question 2

34 By its second question, the referring court asks, in essence, whether the first indent of Article 5(3) of Directive 69/335, which excludes 'the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty' from the amount on which duty is charged, is to be interpreted to mean that only the assets of a capital company which has had an increase in capital are excluded from the amount on which capital duty is charged, or whether assets coming from another company which have increased that capital are also excluded.

35 The first indent of Article 5(3) of Directive 69/335 makes the exclusion from the amount on which duty is charged for which it provides subject to two conditions, namely, first, that the assets in question are allocated to the increase in the capital of a capital company and, second, that they have already been subjected to capital duty.

36 It thus follows from the wording of that provision that it does not refer exclusively to the assets of the capital company which has had an increase in capital. The addition of another condition, under which those assets must also belong to the company which has had an increase in capital, would be contrary to the literal interpretation of the wording of that provision.

37 Such an addition would also run counter to the objective pursued by that provision, which excludes those amounts which have already been subjected to capital duty from the basis of assessment for taxation in order to avoid double taxation of those amounts, with the aim of promoting the free movement of capital (see, by analogy, Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 21, and Case C-441/08 *Elektrownia Pątnów II* [2009] ECR I-10799, paragraph 40). The addition of a further condition to those imposed by the wording of the first indent of Article 5(3) of Directive 69/335, to the effect that the assets in question must also belong to the company which has had an increase in capital, would allow for double taxation of the same amount if the transaction in question were to involve separate companies.

38 It follows that the answer to the second question is that the first indent of Article 5(3) of Directive 69/335, which excludes 'the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty' from the amount on which duty is charged, must be interpreted to mean that it applies irrespective of whether the assets in question are assets of the company which has had an increase in capital or assets coming from another company which have increased that capital.

Costs

39 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:

1. **In the case of a State such as the Republic of Poland, which acceded to the European Union on 1 May 2004, in the absence of derogating provisions in the Act of Accession of that State to the European Union or in any other European Union document, Article 7(1) 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 to mean that the mandatory exemption provided for in that provision applies only to those**

transactions coming within the scope of that directive, as amended, which, on 1 July 1984, were exempted, in that State, from capital duty or were subject to that duty at a reduced rate of 0.50% or less.

2. **The first indent of Article 5(3) of Directive 69/335, which excludes 'the amount of the assets belonging to the capital company which are allocated to the increase in capital and which have already been subjected to capital duty' from the amount on which duty is charged, must be interpreted to mean that it applies irrespective of whether the assets in question are assets of the company which has had an increase in capital or assets coming from another company which have increased that capital.**

[Signatures]