JUDGMENT OF THE COURT (First Chamber)
13 October 1992 *

In Case C-50/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Commerz-Credit-Bank AG — Europartner

and

Finanzamt Saarbrücken,

on the interpretation of Article 7(1)(b) 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),

THE COURT (First Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, R. Joliet and D. A. O. Edward, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Finanzamt Saarbrücken, by Wolfgang Rapräger, Regierungsdirektor und Vertreter des Vorstehers, and by Alois Rosport, Regierungsdirektor,

* Language of the case: German.

— the Commission of the European Communities, represented by Henri Étienne, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 2 April 1992,

after hearing the Opinion of the Advocate General at the sitting on 14 May 1992,

gives the following

Judgment

1 By order of 31 October 1990, received at the Court on 4 February 1991, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 7(1)(b) 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).

2 Those questions were raised in proceedings between Commerz-Credit-Bank AG — Europartner (hereinafter 'Europartner') and Finanzamt (Tax Office) Saarbrücken on the rate of tax charged on a transaction effected on the creation of that company.

3 At the time Commerzbank AG, one of the shareholders in Europartner, had transferred to that company five branches belonging to it in Saarland (Germany). Europartner applied for the transfer of those branches to be taxed at the reduced

rate (0.50%) laid down at the material time in Paragraph 9(2)(3) of the German Kapitalverkehrsteuergesetz (Capital Transfer Tax Law) for the

'acquisition of rights in a German capital company, if and to the extent that ... a ... branch of activity (in German *Teilbetrieb*) of another capital company is transferred to that capital company as consideration'.

4 That provision transposed into German law Article 7(1)(b) of Directive 69/335/EEC, which at the material time provided that a reduced rate of duty was to be levied

'when one or more capital companies transfer ... one or more parts of their business (in German *Zweige ihrer Tätigkeit*) to one or more capital companies which are in the process of being formed or which are already in existence'.

5 In the present case the Finanzamt considered that the transferred branches did not constitute a branch of activity which qualified for the reduced rate of tax, since they were not completely autonomous and did not carry on an activity which by its nature was distinct from that of the rest of the undertaking.

6 The case came before the Bundesfinanzhof, which considered whether the position adopted by the Finanzamt was compatible with Article 7(1)(b) of Directive 69/335/EEC, and consequently referred the following two questions to the Court for a preliminary ruling:

'(1) Does the expression "one or more parts of their business" in Article 7(1)(b) of Directive 69/335/EEC presuppose the existence of a part of an undertaking, in the sense of a part of a larger undertaking which has a certain autonomy, is capable of existing independently, and whose business assets, taken together, serve an activity which of its very nature is clearly distinct from the rest of the undertaking?

(2) If the first question is answered in the negative:

(a) What are the essential characteristics of a "part of a business" within the meaning of Article 7(1)(b) of Directive 69/335/EEC?

(b) Is a branch within the meaning of Paragraph 13 of the Commercial Code "part of a business" within the meaning of Article 7(1)(b) of Directive 69/335/EEC?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 In its questions the national court seeks to ascertain essentially whether a branch is a part of a business within the meaning of Article 7(1)(b) of Directive 69/335/EEC.

9 To answer those questions, it is necessary to examine the various provisions derogating from the general rules in respect of taxation on transfers of one or more parts of a business and to interpret the terms in question in the light of the objectives of those provisions.

10 It is important to note that at the material time the transfer of part of a business was taxed at the reduced rate (0.50%) provided for in Article 7 of Directive 69/335/EEC and defined in Article 2 of Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15). Such transactions

were later exempted from capital duty by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital (OJ 1985 L 156, p. 23).

11 It is apparent from the preambles to those directives that the purpose of the fiscal derogation is to avoid transfers of assets between companies being impeded by tax obstacles, in order to facilitate the reorganization of undertakings, in particular the grouping within one undertaking of various entities carrying on identical or complementary activities.

12 In order to give practical effect to that objective, the phrase 'part of a business' in Article 7 of Directive 69/335/EEC must be defined as covering any part of an undertaking which constitutes an organized aggregate of assets and persons capable of contributing to the performance of a specified activity.

13 The Finanzamt contended that a part of an undertaking must carry on an activity which by its nature is distinct from that of the rest of the undertaking, in order to be capable of being regarded as a part of a business.

14 It should be noted in this respect that the favourable tax treatment of transfers of one or more parts of a business depends not on the number of business activities carried on at the time of the transfer by the company to which the transferred entity belonged, but on that entity's ability to contribute by means of its activity to the development of the undertaking to which it is transferred.

15 The Finanzamt also argued that a branch could not be a part of a business, since it did not have legal personality, was subject to instructions from the head office, and for carrying out transactions used funds made available by the head office.

16 It must be stated on this point that lack of legal personality does not mean that an entity cannot carry on an economic activity, and that in deciding whether a part of an undertaking is a part of a business, it is only the performance of that activity which is to be taken into consideration, even if the activity is financed with funds provided by the head office or is carried on by the entity in question in accordance with instructions from the head office.

17 Consequently, the answer to the questions submitted by the national court must be that a branch constitutes a part of a business within the meaning of Article 7(1)(b) of Directive 69/335/EEC if it is an aggregate of assets and persons capable of contributing to the performance of a specified activity.

Costs

18 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 31 October 1990, hereby rules:

A branch constitutes a part of a business within the meaning of Article 7(1)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes

on the raising of capital if it is an aggregate of assets and persons capable of contributing to the performance of a specified activity.

Rodríguez Iglesias Joliet Edward

Delivered in open court in Luxembourg on 13 October 1992.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
President of the First Chamber