JUDGMENT OF THE COURT (Sixth Chamber)

12 November 2009 *

In Case C-441/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Naczelny Sąd Administracyjny (Poland), made by decision of 8 July 2008, received at the Court on 7 October 2008, in the proceedings

Elektrownia Pątnów II sp. zoo

v

Dyrektor Izby Skarbowej w Poznaniu,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Fourth Chamber, acting as President of the Sixth Chamber, K. Schiemann and P. Kūris, Judges,

* Language of the case: Polish.

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 17 September 2009,

after considering the observations submitted on behalf of:

— Elektrownia Pątnów II sp. zoo, by N. Półtorak, radca prawny,

— the Polish Government, by M. Dowgielewicz, A. Rutkowska and A. Kraińska, acting as Agents,

— the Commission of the European Communities, 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 present reference for a preliminary ruling concerns the interpretation of the second 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), as amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) ('Directive 69/335').

2 The reference has been made in the course of proceedings between Elektrownia Pątnów II sp. zoo ('Elektrownia Pątnów') and the Dyrektor Izby Skarbowej w Poznaniu (Director of the Poznań Tax Office) relating to the application of the Polish law on the taxation of transactions concerning the raising of capital.

Legal context

Community law

3 Article 1 of Directive 69/335 allows Member States to charge, on contributions of capital to capital companies, a duty harmonised in accordance with the provisions of Articles 2 to 9 of that directive and called 'capital duty'.

4 Article 3 of Directive 69/335 defines the expression 'capital company'. As regards the Republic of Poland, such companies are companies under Polish law known as: 'spółka akcyjna' (joint stock company) and 'spółka z ograniczoną odpowiedzialnością' (limited liability company).

5 Article 4(1)(c) of that directive lists, among the transactions that are subject to capital duty, 'an increase in the capital of a capital company by contribution of assets of any kind'.

6 Article 4(2)(c) of Directive 69/335 states:

'2. 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.'

7 Article 5 of Directive 69/335 establishes the basis for the imposition of capital duty. Article 5(1) states:

'The duty shall be charged:

(a) in the case of formation of a capital company or of an increase in its capital or assets, as referred to in Article 4(1)(a), (c) and (d): on the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution....;

...

(e) in the case of loans referred to in Article 4(2)(c) and (d): on the nominal amount of the loan taken up.'

8 The second indent of Article 5(3) of Directive 69/335 provides:

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

...

— the amount of the loans taken up by the capital company which are converted into shares in the company and which have already been subjected to capital duty.'

9 Article 10 of Directive 69/335 states:

'Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

(a) in respect of the transactions referred to in Article 4;

(b) in respect of contributions, loans or the provision of services, occurring as part of the transactions referred to in Article 4;

…'

National law

The legislation in force prior to the Republic of Poland's accession to the European Union

10 Article 1 of the Law on the taxation of civil-law transactions (ustawa o podatku od czynności cywilnoprawnych) of 9 September 2000 ('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,

…

3. In the case of the Memorandum and Articles of Association, the following shall be considered amendments to such documents:

…

(4) subsidies, loans granted to the company by members (shareholders) and donations to it by a member (shareholder) of objects or property rights for unpaid use.'

11 Article 4(1) of the PCC Law provides:

'The tax obligation in respect of civil-law transactions shall be imposed upon:

(1) the parties to the civil-law transactions …'

12 Under Article 5(1) of that law:

'Without prejudice to paragraph 2, natural persons, legal persons and organised entities lacking legal personality which are parties to civil-law transactions shall be jointly and severally liable for payment of the tax …'

13 Under Article 6(1)(8)(d) of that law, the basis for assessment comprises:

'in the event of a loan granted to the company by a member or shareholder — the amount or value of the loan.'

14 Article 2 of the Law amending the Law on the taxation of civil-law transactions (ustawa o zmianie ustawy o podatku od czynności cywilnoprawnych) of 19 December 2003 provides:

'The provisions preceding this Law shall apply to civil-law transactions in respect of which a tax obligation has arisen before the date of entry into force of this Law.'

The legislation in force following the Republic of Poland's accession to the European Union and up to 31 December 2006

15 Pursuant to Article 1 of the PCC Law, as amended by the Law of 19 December 2003, ('the amended PCC Law'):

'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 …

3. In the case of the Memorandum and Articles of Association, the following shall be considered to be 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 1a of the amended PCC Law provides:

'For the purposes of this Law:

…

(2) "Capital company" means a limited liability company or a company limited by shares …'

17 Article 3 of the amended PCC Law states:

'1. A tax obligation shall arise:

…

(2) at the time at which a resolution is passed on an increase in the capital of a company having legal personality'.

18 Pursuant to Article 4 of that law:

‘The tax obligation in respect of civil-law transactions shall be imposed upon:

…

(2) a company having legal personality — in cases where the share capital is increased.’

19 Article 6 of the amended PCC Law states:

‘1. 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 partnership's or company's assets or the value by which the share capital is increased.

…'

20 Article 7 of the amended PCC Law provides:

'1. The following rates of tax shall apply:

…

(9) on the Memorandum and Articles of Association: 0.5%.'

21 Pursuant to Article 9 of that law:

'The following civil-law transactions shall be exempt from tax:

…

(10) loans granted:

…

(h) by a member (shareholder) to a capital company'.

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

22 Elektrownia Pątnów is the subsidiary of Zespół Elektrowni Pątnów-Adamów-Konin SA ('the parent company'). Between 2002 and 2004, the latter granted a series of loans to Elektrowni Pątnów. In accordance with the Polish law which was in force at the time, Elektrowni Pątnów paid the tax on civil-law transactions in respect of the loans which it had taken up.

23 By an agreement of 25 July 2005, the parent company agreed with Elektrownia Pątnów to transfer to the latter the rights to payment which the parent company had in respect of the loans, in consideration for a share subscription in Elektrownia Pątnów.

24 That offsetting resulted in the extinction of Elektrownia Pątnów's debt to the parent company and in an increase in Elektrownia Pątnów's share capital.

25 Furthermore, the parent company assumed the increased value of each of those shares in a total amount which was equivalent to Elektrownia Pątnów's debt to the parent company.

26 The increase in Elektrownia Pątnów's share capital, decided upon by a resolution adopted on 27 July 2005 by a general meeting of the members of that company, constituted, under Polish law, an amendment to the Memorandum and Articles of Association. That transaction was, in accordance with Polish law, subject to the tax on civil-law transactions.

27 Elektrownia Pątnów then lodged a complaint with the tax authorities on the basis that it had incurred double taxation in respect of capital duty in converting loans into shares, contrary to the second indent of Article 5(3) of Directive 69/335, which entered into force within the territory of the Republic of Poland on 1 May 2004 following that State's accession to the European Union.

28 Following the rejection of its complaint, Elektrownia Pątnów brought proceedings before the administrative court. Its action was dismissed. Elektrownia Pątnów thereupon brought an appeal on a point of law. It is in those circumstances that the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In the light of Community law (in particular the provisions of Directive 69/335…), are tax authorities obliged, when charging capital duty on an increase in capital, to take into account transactions relating to the same component of capital which were subject to capital duty before the date of Poland's accession to the European Union?

In particular, does the mechanism provided for in the second indent of Article 5(3) of Directive 69/335 … apply to situations in which the conversion of loans granted to a capital company that are referred to in Article 4(2)(c) of the directive takes place after

accession, but those loans have, on the basis of the national legislation in force until the date of accession, previously been taxed in accordance with the principles set out in the [PCC Law]?'

The question referred for a preliminary ruling

29 The referring court asks, in essence, whether the prohibition — laid down in the second indent of Article 5(3) of Directive 69/335 — on taking into account, in calculating the amount on which the duty is charged in the case of an increase in capital, the amount of the loans taken up by the capital company which are converted into shares in the company and which have already been subjected to capital duty, applies in a situation in which the conversion into shares of loans granted to a capital company took place after the accession of the Member State to the European Union, even though the loans predated that accession and had been taxed at the time in accordance with the national law which was then in force.

30 In order to give an answer to that question, account must be taken, when considering 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 with effect from 1 May 2004 (see, to that effect, Case C-366/05 *Optimus — Telecomunicações* [2007] ECR I-4985, paragraph 25).

31 It follows 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, to that effect, *Optimus — Telecomunicações*, paragraph 26).

32 It follows, furthermore, from settled case-law that new rules apply immediately to the future effects of a situation which arose under the old rules (see, inter alia, Case 270/84

Licata v *ESC* [1986] ECR 2305, paragraph 31). In application of that principle the Court has thus held that, if the Act concerning the conditions of accession of a Member State contains no specific conditions with regard to the application of a provision of the EC Treaty, that provision must be regarded as being immediately applicable and binding on that Member State from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession to the Communities (see, to that effect, Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 14, and Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50).

33 It also follows from settled case-law that, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them (see, inter alia, Case 21/81 *Bout* [1982] ECR 381, paragraph 13; Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22; and *Pokrzeptowicz-Meyer*, paragraph 49).

34 As the Act concerning the conditions of accession of the Republic of Poland to the European Union contains no specific conditions with regard to the application in time of Directive 69/335, it is appropriate therefore, in order to provide an answer to the question referred, to determine whether a situation such as that at issue in the main proceedings constitutes a situation which arose prior to the entry into force of Directive 69/335 in Poland and to which that directive could therefore apply retroactively only if it was clearly intended to have that effect, or whether it constitutes a situation which arose prior to the entry into force of that directive in Poland, but the future effects of which are governed by that directive from the date of its entry into force, in accordance with the principle that new rules apply immediately to current situations (see, to that effect, *Pokrzeptowicz-Meyer*, paragraph 51).

35 In this regard, it should be noted that taxation of the loans at issue in the main proceedings, which were taken up prior to the Republic of Poland's accession to the European Union, occurred on the basis of the legislation in force at the time of the act

which triggered the imposition, consisting of the drafting of civil-law documents which recorded those loans. At that date, no rules existed under Polish law which precluded those transactions from being subject to tax once as loans and then again if they were converted into an increase in capital.

36 The introduction into Polish law of such a rule prohibiting the same amounts from being taxed again following their transfer into capital cannot be considered to cast doubt on taxation which had already occurred, and thereby to have retroactive effect.

37 That rule has, as its sole objective and scope, the prevention of double taxation of the same taxable amount and the rule applies, from its entry into force, both to loans already assumed prior to the Republic of Poland's accession to the European Union — and thus prior to the entry into force of that rule within the Polish legal order — and converted into shares subsequent to that accession, and to loans agreed after that accession.

38 It follows that the second indent of Article 5(3) of Directive 69/335 is merely a new rule which applies immediately to transactions which are carried out after its entry into force in Poland and which come within it scope.

39 Consequently, the second indent of Article 5(3) of Directive 69/335 requires that, in establishing the taxable amount for the purposes of capital duty on an increase in a company's capital arising from the conversion into shares — after the Republic of Poland's accession to the European Union — of loans taken up by that company prior to that accession, account be taken of the previous taxation of those loans on the basis of the national law in force at the material time.

40 Contrary to the Republic of Poland's contentions, such an interpretation of Directive 69/335 in no way amounts to a retroactive application of that directive to facts occurring prior to that Member State's accession, but simply amounts to applying, from the date of its entry into force, the prohibition of double taxation contained therein, which necessarily leads to account also being taken of taxation which had already occurred prior to that entry into force.

41 It is, moreover, not appropriate for the Court to ascertain whether, as the Republic of Poland appeared to be claiming at the hearing, the components taxed, prior to its accession, on the basis of the national law in force at the material time correspond entirely or partially to the components taxed following that accession. That is a matter solely for the national court seised of the dispute in the main proceedings.

42 In those circumstances, the answer to the question referred for a preliminary ruling is that the second indent of Article 5(3) of Directive 69/335 requires that, in determining the amount of capital duty chargeable on an increase in a company's capital arising from the conversion into shares — following the Republic of Poland's accession to the European Union — of loans taken up by that company prior to that accession, account be taken of the previous taxation of those loans on the basis of the national law in force at the material time.

Costs

43 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 (Sixth Chamber) hereby rules:

The second indent of Article 5(3) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, requires that, in determining the amount of capital duty chargeable on an increase in a company's capital arising from the conversion into shares — following the Republic of Poland's accession to the European Union — of loans taken up by that company prior to that accession, account be taken of the previous taxation of those loans on the basis of the national law in force at the material time.

[Signatures]