JUDGMENT OF THE COURT
12 November 1987 *

In Case 112/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof (Regional Court of Appeal), Amsterdam for a preliminary ruling in the action pending before that court between

Amro Aandelen Fonds, represented by its manager, Amsterdam Rotterdam Bank NV

and

Inspecteur der Registratie en Successie (Inspector of Registration and Death Duties), Amsterdam (now in Haarlem)

on the interpretation of Article 3 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (Official Journal, English Special Edition 1969 (II), p. 412),

THE COURT

composed of: Lord Mackenzie Stuart, President, G. C. Rodríguez Iglesias (President of Chamber), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

having regard to the Report for the Hearing and further to the hearing on 19 May 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 July 1987,

gives the following

* Language of the Case: Dutch.

Judgment

1 By order of 7 March 1986, which was received at the Court on 12 May 1986, the Gerechtshof, Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (Official Journal L 249, p. 25).

2 That question was raised in proceedings between Amro Aandelen Fonds and the Inspecteur der Registratie en Successie regarding the latter's decision to refuse repayment of the sums paid by way of capital duty on capital by the manager of a fund after registering the issue of a number of participations.

3 According to the order for reference Amro Aandelen Fonds is an investment fund the capital of which is constituted by payments made available to the manager of the fund for investment in exchange for which the participants receive participations.

4 In the order for reference the national court holds that under Netherlands Law the contested fund is a 'doelvermogen' and that the transactions carried out by it consisting in the receipt of sums of money for investment and the administration thereof as an investment fund in return for the issue of participations, as defined in the management conditions, must be regarded as the raising of share capital and as such liable to capital duty under the Netherlands Law of 24 December 1970 ('Wet op belastingen van rechtsverkeer', *Staatsblad* 611).

5 Considering that there were doubts as to whether that law was compatible with the aforementioned Directive 69/335/EEC and that an interpretation of the term 'company' in Article 3 (2) of the directive was required, the Gerechtshof stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'What requirements, besides that of operating for profit, must a group of persons (providers of capital) without legal personality satisfy in order to be regarded as a "company" within the meaning of Article 3 (2) of the directive?'

6 Reference is made to the Report for the Hearing for a fuller account of the national and Community provisions at issue, the course of the procedure and the observations made to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 The object of Directive 69/335 is the harmonization of indirect taxes on the raising of capital in order to encourage free movement of capital. According to the recitals in the preamble its aim is that 'duty on the raising of capital . . . by a company or firm should be charged only once' and that therefore 'this duty should be harmonized, with regard both to its structure and to its rates'.

8 Article 1 provides that the duty, called 'capital duty' shall be charged 'on contributions of capital to capital companies'. In order to define the meaning of 'capital companies' for the purposes of the directive, Article 3 (1) refers, on the one hand, to certain categories of companies under the national law of the various Member States (Article 3 (1) (a)), and, on the other, to the negotiable nature in a stock exchange of the shares (Article 3 (1) (b)) and to the free negotiability of the shares where they represent the risk shared. The definition of capital company is thus wide and not tied to any specific form of company.

9 Article 3 (2), the interpretation of which the national court is requesting, provides:

'For the purposes of the application of this directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

10 The object of that provision is to prevent the choice of a particular legal form from leading to a different fiscal treatment of activities which, from the economic point of view, are equivalent.

11 To that end, for the purposes of liability to capital duty the provision is intended to apply to the raising of capital which, while having the same economic function as capital companies properly so called, namely the earning of profit by the pooling of capital in a separate fund, does not satisfy the criteria of a capital company as defined in Article 3 (1).

12 Article 3 (2) leaves Member States free, however, to limit the scope of that deeming clause by allowing them to exempt the raising of certain capital from liability to capital duty.

13 The answer to the question put by the national court must therefore be that a grouping of persons which does not have legal personality and whose members provide capital for a separate fund with a view to making profits is to be deemed to be a capital company by virtue of Article 3 (2) of Directive 69/335 without there being any additional requirement. It is for the national legislature, however, by virtue of the same provision, to determine whether or not such a grouping is to be regarded as a capital company for the purpose of charging capital duty.

Costs

14 The costs incurred by the Commission of the European Communities and the Netherlands Government, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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,

in answer to the question submitted to it by the Gerechtshof, Amsterdam, by order of 7 March 1986, hereby rules:

A grouping of persons which does not have legal personality and whose members provide capital for a separate fund with a view to making profits is to be deemed to be a capital company by virtue of Article 3 (2) of Directive 69/335 without there being any additional requirement. It is for the national legislature, however, by virtue of the same provision, to determine whether or not such a grouping is to be regarded as a capital company for the purposes of charging capital duty.

Mackenzie Stuart Rodríguez Iglesias Koopmans

Everling Bahlmann Galmot O'Higgins

Delivered in open court in Luxembourg on 12 November 1987.

Acting as President

P. Heim G. Bosco

Registrar President of Chamber