JUDGMENT OF THE COURT (First Chamber)
18 March 1993 *

In Case C-280/91,

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

Finanzamt Kassel-Goethestraße

and

Viessmann KG

on the interpretation of Article 4 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: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of the Commission of the European Communities by Henri Étienne, Principal Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

* Language of the case: German.

after hearing the oral observations of the Kommanditgesellschaft Viessmann, represented by Dr E. Stehmann, Wirtschaftsprüfer und Rechtsanwalt, Fachanwalt für Steuerrecht, and the Commission of the European Communities, at the hearing on 12 November 1992,

after hearing the Opinion of the Advocate General at the sitting on 17 December 1992,

gives the following

Judgment

1 By order of 31 July 1991 received at the Court on 31 October 1991, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 4 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 That question was raised in proceedings between the Finanzamt (Tax Office), Kassel (hereinafter 'the Finanzamt'), and Viessmann GmbH&Co. KG (hereinafter 'Viessmann') regarding the taxation of the transfer of a shareholding in that company.

3 Viessmann is a limited partnership under German law. According to the Opinion of the Advocate General, which should be consulted for further information (see points 6 to 9), Viessmann has a capital of DM 9.8 million which was subjected to the tax on the raising of capital when the respective contributions were originally subscribed. It has two partners with unlimited liability ('general' partners) and one partner whose liability is limited to the amount he subscribed ('limited' partner).

4 On 8 July 1983, V., who is one of the partners with unlimited liability, transferred a portion of his shareholding to his wife and children who, according to the terms of the transfer agreement, became partners in the firm with limited liability.

5 The Finanzamt considered that, by passing from a partner with unlimited liability to persons whose liability was limited, the shares transferred had undergone a conversion and concluded that the transfer must be deemed to be an issue of company shares, thus attracting capital duty under Paragraph 2(1)(i) of the Kapitalverkehrsteuergesetz (German law on the raising of capital), which provides that a tax is due 'in the case of the acquisition by a first-time buyer of company shares in a capital company whose registered office is situated on the national territory'.

6 The Bundesfinanzhof was uncertain whether the interpretation adopted by the Finanzamt was consistent with the directive on the raising of capital and, in particular, whether a transfer of a shareholding such as had been effected in the present case constituted a transaction subject to capital duty for the purposes of Article 4 of the directive.

7 Article 4(1) lists the transactions which must be subjected to capital duty by the Member States.

One of these is:

'(c) an increase in the capital of a capital company by contribution of assets of any kind'.

8 Article 4(2) lists the transactions which Member States may subject to capital duty. Under that provision, the following in particular may be taxed:

'(b) an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which do result in variation in the rights in the company or which may increase the value of the company's shares'.

9 It is against that background that the Bundesfinanzhof decided to refer the following question to the Court for a preliminary ruling:

'Does Article 4 of Council Directive 69/335/EEC allow Member States to subject to capital duty the conversion of part of a *Komplementäranteil* (general partner share) into a *Kommanditanteil* (limited partner share) within a pre-existing GmbH Co. KG?'

10 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.

11 The purpose of the national court's question is to ascertain whether the transfer by a member with unlimited liability for the debts of a capital company of part of his shareholding in that company to a member whose liability in the company is limited can be subject to capital duty under Article 4 of the aforementioned directive.

12 In answering that question, it should be borne in mind that the directive harmonizes both the structure and the rate of indirect taxes on the raising of capital

within the Community and that Article 4 of the directive lists the transactions which the Member States may or must, according to the category, subject to capital duty.

13 None of the categories mentioned in that provision covers a transaction whereby a member with unlimited liability for the debts of a capital company transfers part of his shareholding in that company to a member whose liability is limited. A transaction of that nature does not, in particular, involve either an increase in the capital of a capital company within the meaning of Article 4(1)(c) of the directive, or an increase in the assets of a capital company as referred to in Article 4(2)(b) and, consequently, cannot be subject to the tax prescribed for the categories listed in those provisions.

14 It follows that a transfer of shares such as was effected in the present case does not constitute a transaction which may be taxed by virtue of Article 4 of the directive.

15 The Commission has asked the Court to consider whether that transfer of shares could be subject to capital duty by virtue of Article 6 of the directive.

16 Article 6 provides, with respect to limited partnerships, that:

'1. Each Member State may exclude from the basis of assessment ... the amount of the capital contributed by a member with unlimited liability for the obligations of a capital company as well as the share of such a member in the company's assets.

2. Where a Member State exercises the power provided for in paragraph 1, the following shall be subject to capital duty:

— ...

— ...

— any transaction as a result of which the liability of a member is limited to his share in the company's capital, in particular when the limitation of liability results from the conversion of a capital company into a different type of capital company.

...'

17 It is the Court's duty to interpret all provisions of Community law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts.

18 It should be observed, with respect to Article 6 of the directive, that that provision is designed, in particular, to prevent a situation in which, in the Member States concerned, shares which have not been taxed because they constituted the contribution of a member with unlimited liability are later transferred to a member with limited liability and are thus converted into limited partner shares without being subjected to the capital duty which their issue should have attracted.

19 However, as mentioned at paragraph 3 above, tax was paid on all the shares constituting the capital of the Viessmann company at the time when the contributions corresponding to those shares were subscribed.

20 It follows that a transfer of a shareholding such as that effected in the present case cannot be subject to capital duty by virtue of Article 6 of the directive concerning indirect taxes on the raising of capital.

21 Accordingly, it should be stated in reply to the question put by the national court that the transfer by a member with unlimited liability for the debts of a capital company of part of his shareholding to a member whose liability in that company is limited cannot be subject to capital duty by virtue of Article 4 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital. Nor may such a transaction be taxed by virtue of Article 6 of that directive in the Member States which have elected to exempt contributions subscribed by members with unlimited liability, where the shares transferred have already been subjected to capital tax at the time of their creation.

Costs

22 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 proceedings 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 question referred to it by the Bundesfinanzhof, by order of 31 July 1991, hereby rules:

The transfer by a member with unlimited liability for the debts of a capital company of part of his shareholding to a member whose liability in that company is limited cannot be subject to capital duty by virtue of Article 4 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital. Nor may such a transaction be taxed by virtue of Article 6 of that directive in the Member States which have elected to exempt contributions subscribed by members with unlimited liability, where the shares transferred have already been subjected to capital tax at the time of their creation.

Rodríguez Iglesias Joliet Edward

Delivered in open court in Luxembourg on 18 March 1993.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
President of the First Chamber