JUDGMENT OF THE COURT (Fifth Chamber)
5 February 1991 *

In Case C-249/89,

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

Trave Schiffahrts-Gesellschaft mbH & Co. KG

and

Finanzamt Kiel-Nord,

on the interpretation of Article 4(2)(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 (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, G. C. Rodríguez Iglesias, Sir Gordon Slynn, R. Joliet and F. Grévisse, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

after considering the written observations submitted on behalf of:

the Netherlands Government, by B. R. Bot, Secretary-General at the Ministry of Foreign Affairs, acting as Agent,

* Language of the case: German.

the Commission of the European Communities, by M. H. Étienne, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument from the Commission at the hearing on 24 October 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 13 November 1990,

gives the following

Judgment

1 By order of 28 June 1989, which was received at the Court Registry on 7 August 1989, the Bundesfinanzhof (Federal Finance Court) referred to the Court of Justice pursuant to Article 177 of the EEC Treaty a question on the interpretation of Article 4(2)(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 The question was raised in proceedings between the company Trave Schiffahrts-Gesellschaft mbH & Co. KG (hereinafter referred to as 'Trave') and the Finanzamt (Finance Office) Kiel-Nord concerning the levying of capital duty on the granting to that company by its members of interest-free loans.

3 Trave was set up under an instrument of 27 June 1975 in order to cover the risks which one of its members assumed as part of a large construction project. From 1977 to 1983, Trave, which incurred heavy losses, received from its members interest-free loans amounting to DM 131 million.

4 By a notice of 7 December 1984 the Finanzamt Kiel-Nord demanded from Trave capital duty of DM 361 335 pursuant to Paragraph 2, subparagraph 1(4)(c) of the Kapitalverkehrsteuergesetz (Capital Transfer Tax Law). That provision makes subject to capital duty the transfer by a member to a German capital company of assets in return for consideration lower than their value if the services may increase the value of the company's shares.

5 That law implements in the Republic of Germany Article 4(2)(b) of Council Directive 69/335 which authorizes the Member States to subject to capital duty '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'.

6 After failing in its action in the lower court, Trave appealed to the Bundesfinanzhof on a point of law.

7 In its order for reference, the Bundesfinanzhof explains that, according to its established case-law, a contribution to the success of an undertaking ('Erfolgsbeitrag') must be considered to be a service within the meaning of Article 4(2)(b) of Directive 69/335, even if the increase in the assets of the undertaking occurs only when the capital lent is used and the resultant saving in expenditure is made. It points out, however, that its case-law has been criticized by some German academic writers on the ground that an increase in the assets, required by the provision of Community law in question, presupposes an increase in the net assets of the company.

8 Since it considered that its decision depended on the interpretation of Article 4(2)(b) of Directive 69/335, the Bundesfinanzhof decided to stay the proceedings until the Court of Justice had delivered a preliminary ruling on the following question:

'Does Article 4(2)(b) of Directive 69/335/EEC permit the Member States to impose capital duty on an interest-free loan granted by a member of a heavily

over-indebted capital company to that company on the basis of the loan's utility value (saved expenditure on interest)?'

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of 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.

10 By its question the Bundesfinanzhof essentially seeks to ascertain whether the granting of an interest-free loan by a member to a heavily over-indebted capital company is a transaction which may be subjected to capital duty pursuant to Article 4(2)(b) of Directive 69/335 and, if so, whether the basis of assessment for that duty consists of the utility value of the loan, that is to say the amount of interest saved.

11 For the purpose of examining whether the granting of an interest-free loan constitutes a transaction covered by Article 4(2)(b) of Directive 69/335, it must be determined whether the effect of that operation is to increase the assets of the company benefiting from it and whether it may increase the value of the company's shares.

12 As regards the first condition — an increase in the assets — it must be observed that the granting of an interest-free loan allows the company to have capital available without having to bear its cost. The resultant saving in interest leads to an increase in its assets by allowing the company to avoid expenditure which it would otherwise have to bear.

13 As regards the second condition — an increase in the value of the company's shares — reference must be made to the judgment of the Court in Case 270/81 *Felicitas Rickmers-Linie KG & Co.* v *Finanzamt für Verkehrsteuern* [1982] ECR 2771, in which the Court held that 'according to the principles on which harmonized capital duty is based, such duty should be charged only on transactions which constitute in law the raising of capital and only in so far as they contribute to increasing the company's economic potential', that reason having been taken from the preamble to Council Directive 74/553/EEC of 7 November 1974 amending Article 5(2) of Directive 69/335/EEC concerning indirect taxes on

the raising of capital (OJ 1974, L 303, p. 9). It follows that the decisive test to be satisfied in order for a capital-raising transaction to attract capital duty is the strengthening of the company's economic potential.

14 In those circumstances, the granting of an interest-free loan must be regarded as helping to strengthen the company's economic potential in so far as it enables the company to dispose of capital without having to bear its cost. It must therefore be regarded as likely to increase the value of the company's shares.

15 It must therefore be concluded that the granting of an interest-free loan to a company by one of its members constitutes a transaction which may be taxed under Article 4(2)(b) of Directive 69/335.

16 As regards the basis of assessment for capital duty, reference must be made to Article 5(1)(d) of the Directive, which provides that 'in the case of an increase in the assets, as referred to in Article 4(2)(b)', duty is to be charged 'on the actual value of the services provided, after deduction of the liabilities assumed and the expenses borne by the company as a result of the provision of such services'.

17 Since no expenses are borne by the company, capital duty is to be charged, in application of Article 4(2)(b), on the amount of interest saved by the company, which is to be determined by the national court.

18 Consequently, the answer to be given to the question referred to the Court should be that Article 4(2)(b) of Council Directive 69/335/EEC allows Member States to subject to capital duty an interest-free loan granted by a member of a heavily over-indebted capital company to that company on the basis of the loan's utility value, namely the amount of interest saved, which is to be determined by the national court.

Costs

19 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since the proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question submitted to it by the Bundesfinanzhof, by order of 28 June 1989, hereby rules that:

Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital allows Member States to subject to capital duty an interest-free loan granted by a member of a heavily over-indebted capital company to that company on the basis of the loan's utility value, namely the amount of interest saved, which is to be determined by the national court.

Moitinho de Almeida Rodríguez Iglesias

Slynn Joliet Grévisse

Delivered in open court in Luxembourg on 5 February 1991.

J.-G. Giraud
Deputy Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber