OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 7 May 1996 *

I — Introduction

1. The questions referred for a preliminary ruling in this case relate to the interpretation of Directive 69/335/EEC [1] concerning indirect taxes on the raising of capital. They seek in particular to ascertain whether an interest-free loan granted by a parent company to its subsidiary falls within the cases covered by the aforesaid directive and whether the payment of capital duty on the saving by the subsidiary of interest on such a loan precludes the amount of capital so contributed from being subject to the tax on income payable by the parent company.

II — Facts

2. A/S Richard Frederiksen & Co. (hereinafter 'Frederiksen'), the plaintiff in the main proceedings, holds all the shares in Sydjysk Sten og Grus A/S (hereinafter 'the subsidiary').

In 1984 the applicant granted the subsidiary an interest-free loan. The competent Danish tax authorities considered for the purposes of determining the taxable income that the loan in question yielded a return equal to 11% of its average value and consequently proceeded to alter the plaintiff's tax returns for the financial years 1986/87, 1987/88 and 1988/89. The tax authorities did so on the ground that the interest-free loan did not constitute a normal business transaction but had been granted solely on the basis of the two companies' community of interests. Consequently the plaintiff was charged income tax on the return it was deemed to have received from the interest-free loan granted to the subsidiary by taxing the capital transferred to the subsidiary in the form of the interest saved. Furthermore, the tax authorities considered that the revenue theoretically yielded by the interest-free loan was a subsidy on which the subsidiary was liable to tax, but that the subsidiary was in any event entitled to deduct that sum for tax purposes. Therefore the amendment made by the tax authorities in relation to the subsidiary was 'neutral' from the tax point of view.

3. The plaintiff brought an action before the Landskatteret (Regional Tax Tribunal), Copenhagen, against the decision of the tax authorities. The national court upheld the decision. The plaintiff then appealed against that judgment to the Østre Landsret (Eastern

* Original language: Italian.

1 — 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).

Regional Court), which considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Should Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital be interpreted as covering the current value of an interest-free loan?

2. Should Article 10 of the directive be interpreted as precluding income tax from being levied on a parent company in respect of interest fixed after the event on an interest-free loan to a subsidiary, where the amount of the saving on interest is regarded as a contribution of capital to the subsidiary within the meaning of the directive?'

III — The provisions applicable to the dispute

4. Article 4(2) of Directive 69/335 provides as follows:

'The following transactions may be subject to capital duty:

(...)

(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;

(...)'.

5. Article 10 of Directive 69/335 provides as follows:

'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;

(...)'.

IV — The dispute

The first question

6. On the basis of the Court's case-law, [2] I consider that the answer to the first question referred by the national court must be affirmative. However, the concept of 'the accruing value of an interest-free loan', referred to by the national court in that question, calls for explanation here. For the purposes of Article 4(2)(b) of Directive 69/335/EEC, the expression must be understood to mean the amount of interest that the subsidiary should have paid at market rates to the parent company. That sum constitutes the enrichment of the subsidiary *donandi causa*, which is equated by the directive with a contribution of capital.

The second question

7. The second matter raised by the national court is essentially whether Article 10 of Directive 69/335 precludes Member States from considering the contribution of capital resulting from an interest-free loan as a basis of assessment for the application of income tax to the contributing company.

8. The plaintiff in the main proceedings argues that the answer to the second question referred by the national court must be affirmative. The breadth of the wording used in Article 10 of Directive 69/335 ('not charge ... any taxes whatsoever') militates in support of the view that a contribution of capital made by means of an interest-free loan may not be taxed in a different way from that laid down by the directive itself. The plaintiff goes on to claim that the Danish version of the directive in question does not specify in the title that the taxes on the raising of capital are *indirect*, as the other language versions do. Finally the plaintiff relies on Article 12 of the directive concerned which establishes a list, held by the Court [3] to be exhaustive, of the taxes and other duties which may be imposed on transactions subject to capital duty, thereby excluding other possible forms of taxation. According to the plaintiff, that interpretation is in keeping with the OECD model of a double taxation agreement and in particular with Articles 2 and 24 of that text.

9. The defendant in the main proceedings, the Member States which have submitted observations and the Commission consider that the answer to the second question must be in the negative. Various arguments have

2 — Case C-249/89 *Trave Schiffahrts-Gesellschaft* [1991] ECR I-257.

3 — Case 36/86 *Ministeriet for Skatter og Afgifter* v *Dansk Sparinvest* [1988] ECR 409.

been put forward to that effect. In their view, the directive is intended to harmonize indirect taxes, whilst making no provision at all concerning direct taxes. The defendant, together with the Member States and the Commission, have pointed to the difference between a taxpayer required to pay tax where it is levied on the contribution of capital (the *accipiens* or recipient company) and a taxpayer required to pay income tax (the *donans* or contributing company). Finally, in accordance with Community law, the rules governing direct taxes are a matter for the Member States, the directive being confined to harmonizing the duty on contributions of capital in order to facilitate the free movement of capital intended as such.

10. To my mind, the answer to the second question referred by the national court depends on the intention to be ascribed to the Community legislature in adopting Directive 69/335/EEC and on the scope of that legislation.

I shall start with the last point, which seems to me to be decisive. What kind of taxes, duties and charges is the directive intended to harmonize? The intentions of the Community legislature may be deduced not only from the actual title of the directive (which, in all the language versions in which it was originally adopted refers to '*indirect taxes*', unlike the Danish version), but also quite plainly from the last recital in the preamble thereto, which states that 'the retention of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this directive and those taxes should therefore be abolished'.

11. Furthermore, it should be noted in that regard that the prohibition laid down in Article 10 of the directive on charging '*any taxes whatsoever*', apart from capital duty, in respect of the transactions referred to relates to transactions of a financial nature which result in a transfer of economic resources from one person to another. The tax deducted in this case, which under Danish law is levied on the return received by the parent company from the interest on the loan, relates to another, quite different event in the taxpayer's existence, namely the creation of income. That chargeable event is necessarily distinct from a transfer of assets, even from the temporal point of view. The return in question must therefore be subject, in accordance with the rules and conditions laid down in the applicable tax legislation, to income tax. The directive in question, moreover, is not concerned with taxing the creation of income — which is a matter for the Member States themselves — but regulates the possible methods of bringing about an increase in company capital through the transfer of assets by harmonizing the forms of taxation.

12. To construe Article 10 of the directive as exempting the transactions referred to

therein even from direct taxes amounts to encouraging potential tax evasion. Consequently, the result of such an interpretation of the legislation would be to encourage transactions involving a contribution of capital or financial transactions treated as equivalent thereto, especially where effected between States, which would thus escape direct taxation. Such practices would in their turn give rise to distortions on the capital markets of those Member States which tax more heavily the profits made by companies established on their territory, resulting in serious consequences precisely for the sources from which those companies supply capital. That state of affairs would lead to results contrary to the objective pursued by the Community legislature.

V — Conclusion

13. For the reasons set out above, I propose that the Court should reply as follows to the questions referred by the Østre Landsret, Copenhagen:

— Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 also relates to the amount corresponding to the interest which would under normal market conditions have been produced by a loan granted by a parent company to a subsidiary, where that loan was contracted without any condition as to payment of interest;

— Article 10 of Directive 69/335/EEC does not concern direct taxes on income which may be imposed on sums transferred by a parent company to a subsidiary by means of an interest-free loan.