JUDGMENT OF THE COURT (Sixth Chamber)

17 September 2002 *

In Case C-392/00,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Finanzamt Hannover-Nord

and

Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken mbH,

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), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, J.-P. Puissochet, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: C. Stix-Hackl,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Finanzamt Hannover-Nord, by D. Niemeyer, acting as Agent,

— Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken mbH, by K. Kleine, Rechtsanwalt,

— the Commission of the European Communities, by K. Gross and R. Lyal, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Finanzamt Hannover-Nord, Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken mbH and the Commission at the hearing on 6 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 17 January 2001,

gives the following

Judgment

1 By order of 9 August 2000, received at the Court on 25 October 2000, the Bundesfinanzhof (Federal Finance Court) referred for a preliminary ruling under Article 234 EC 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), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23), hereinafter 'Directive 69/335'.

2 That question was raised in proceedings between Finanzamt (Tax Office) Hannover-Nord (hereinafter 'the Finanzamt') and Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken mbH (hereinafter 'Nord') relating to the charging of capital duty on interest-free loans granted to Nord by its members.

Legal background

Community legislation

3 As is clear from the first recital in the preamble to Directive 69/335, the directive is intended to promote the free movement of capital, which is considered to be essential to the creation of an economic union whose characteristics are similar to those of a domestic market.

4 According to the sixth recital in the preamble to Directive 69/335, it is inherent in that objective, as regards duty on the raising of capital, that all indirect taxes hitherto in force in the Member States should be abolished and replaced by a tax that is charged just once within the common market and at the same level in all the Member States.

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

'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:

...

(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;

...'.

National law

6 Paragraph 2(1)(4)(c) of the Kapitalverkehrsteuergesetz (Law on capital transfer tax) of 17 November 1972 (BGBl. 1972, p. 2130, hereinafter 'the KVStG') provides that a transfer of assets by a member to a German capital company in exchange for a consideration which is less than the value of those assets is to be subject to capital duty, provided that the contribution is liable to increase the value of the rights in the company.

7 Under the case-law of the German courts, the grant to a capital company of an interest-free loan by a member of that company amounts to a 'transfer of assets' within the meaning of Paragraph 2(1)(4)(c) of the KVStG.

The main proceedings and the question referred for a preliminary ruling

8 According to the file in the main proceedings, Nord is a German limited liability company whose members were, in 1990, Preussen Elektra AG and Gemein-

schaftswerke Weser GmbH. In 1986, the two members joined together to form a civil-law company ('Gesellschaft bürgerlichen Rechts', hereinafter 'the GbR'), in order to ensure uniform policy within Nord.

9 As from 1 January 1987, the GbR and Nord were bound by a control and profit and loss transfer agreement under which Nord was, in its business activities, to act exclusively in accordance with the will of the GbR, and was obliged to transfer to the GbR all profits accrued during the term of the agreement. The GbR undertook for its part to make good any annual loss incurred by Nord during the term of the agreement in so far as it could not be covered from free reserves. The members were entitled to terminate the agreement at the end of each calendar year subject to giving one year's notice. They were not, however, entitled to exercise that right before 31 December 1991. Nord for its part had waived its right to terminate.

10 In the course of 1990 the members granted Nord interest-free loans. The Finanzamt considered these contributions to be subject to capital duty, and issued a notice of assessment to tax to Nord. Nord brought an action against that notice of assessment before the Niedersächsisches Finanzgericht (Lower Saxony Finance Court), which upheld the action by judgment of 24 February 1999.

11 After the Niedersächsisches Finanzgericht had granted the Finanzamt leave to appeal on a point of law ('Revision'), the Bundesfinanzhof was seised of the dispute. In support of its appeal the Finanzamt pleaded infringement of Paragraph 2(1)(4)(c) of the KVStG and asked for the judgment of the Finanzgericht to be set aside and for the action brought by Nord to be dismissed.

12 In its order for reference the Bundesfinanzhof observes that the nature of the loan that gave rise to the main proceedings means that the facts in this case bear a resemblance to those in Case C-249/89 *Trave Schiffahrts-Gesellschaft* [1991] ECR I-257. However, the position in the main proceedings differs from the situation in point in *Trave,* owing to the profit and loss transfer agreement entered into by Nord and its members, which is similar to the one that was at issue in Case C-38/88 *Siegen* [1990] ECR I-1447. Indeed, it was the decision in *Siegen* that led the Niedersächsisches Finanzgericht to find that the interest-free loan at issue in the main proceedings did not have the effect of increasing the value of the rights in the recipient company.

13 The Bundesfinanzhof further indicates that it is not persuaded that the Niedersächsisches Finanzgericht's reading of the decision in *Siegen* is wholly apposite, since the grounds for that decision could be interpreted as applying only to the absorption of losses under a profit and loss transfer agreement, and not to other contributions by members. In that connection, the national court points out, *inter alia*, that the facts in *Siegen* did not concern an interest-free loan, and that the decision in that case was based primarily on the view, shared by the national court, that, in view of its purpose, capital duty applies to transactions that strengthen a company's economic potential by means of an injection of capital, and that the Court's interpretation in the context of absorption of losses does not necessarily hold true for the grant of an interest-free loan.

14 Finally, the Bundesfinanzhof considers that the fact that there is a lapse of time between the grant of the interest-free loan and the transfer of profits only becomes unimportant where, notwithstanding the existence of a profit and loss transfer agreement, the company and its members are to be regarded as a single economic unit, and the benefit to the company in that regard is offset by the disadvantages to the members. However that approach is unknown to the capital duty regime and has never yet been followed by the Court.

15 In those circumstances, the Bundesfinanzhof took the view that the resolution of the proceedings before it depended on the interpretation of Directive 69/335, and decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with Article 4 of Council Directive 69/335/EEC... to subject to capital duty the grant of an interest-free loan by a member of a company to that company, if at the time of granting the loan there existed a profit and loss transfer agreement between the company and the member?'

The question referred for a preliminary ruling

16 By its question the national court is asking, essentially, whether Article 4(2)(b) of Directive 69/335 must be interpreted as not precluding capital duty being charged on the amount of interest a company saves as a result of being granted an interest-free loan by its members, where the members entered into a profit and loss transfer agreement with the company before they granted the loan.

17 In order to reply to the question reformulated in that way, it is necessary to determine whether the grant of an interest-free loan in circumstances such as those described in the order for reference has the effect of increasing the recipient company's assets, and whether it is liable to increase the value of the rights in the company.

18 In that regard it must be observed, first, that it is settled case-law that the granting of an interest-free loan to a company allows the company to have capital

available without having to bear its cost; that 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; and that, by saving it that expense, the advantage of such a loan helps to strengthen the company's economic potential, and must therefore be regarded as likely to increase the value of the rights in the recipient company (*Trave Schiffahrts-Gesellschaft*, cited above, paragraphs 12 and 14, and Case C-287/94 *Frederiksen* [1996] ECR I-4581, paragraphs 12 and 13).

19 Article 4(2)(b) of Directive 69/335 is therefore to be interpreted as meaning that, where a company receives an interest-free loan from one of its shareholders, capital duty may be charged on the utility value of the loan, which is to say the amount of interest saved (see, to that effect, *Trave Schiffahrts-Gesellschaft*, cited above, paragraph 17, and *Frederiksen*, cited above, paragraph 14).

20 However it must be borne in mind that it is also clear from the case-law that, for the purposes of Article 4(2)(b) of Directive 69/335, a company's assets include all the property which the members have contributed, together with any increase in its value, and that a company which realises a profit and adds it to its reserves thereby increases its assets, whilst the assets of a company which incurs losses will decline (*Siegen*, cited above, paragraph 12).

21 The Court has inferred from that definition of a company's assets that, whilst the absorption by a member of losses incurred by a company must in principle be regarded as a contribution that increases the company's assets, the same is not true if such losses are absorbed under a profit and loss transfer agreement entered into before the losses were sustained, since it is the purport of such an undertaking that any losses incurred by the company subsequent thereto are to have no effect on the level of the company's assets (*Siegen*, cited above, paragraph 13).

22 From an economic point of view, the same rule as applies to absorption of losses must in principle apply to transfers of profits, so that a company which makes a profit, but is bound by a profit and loss transfer agreement with its members, cannot add that profit to its reserves, and its assets will not therefore as a rule be increased.

23 Therefore, where a member makes a contribution, such as an interest-free loan, which only affects profits and losses realised in a particular financial year, and those profits and losses are required, under a profit and loss transfer agreement entered into before they were realised, to be passed on to or absorbed by that member in their entirety, the contribution cannot in principle have the effect of increasing the company's assets.

24 However, as the Finanzamt has pointed out, and as both Nord and the Commission acknowledged at the hearing, it is conceivable that a contribution by a company's members may, notwithstanding the existence of a profit and loss transfer agreement between company and members, be such as to increase the company's assets, if part or all of the contribution remains durably part of the company's asset base. Such would be the case, *inter alia*, where part of the profit realised is intended to supply statutory reserves, or where the profit and loss transfer agreement is not implemented. It is for the national court to determine, in the light of all the characteristics of the transaction in point in the main proceedings, whether, and if so to what extent, an interest-free loan granted to a capital company by one of its members has durably augmented the company's assets, or whether the contribution has had no effect on the level of the company's assets, owing to the existence of a profit and loss transfer agreement entered into before the loan was granted.

25 In those circumstances, the reply to be given to the question referred must be that Article 4(2)(b) of Directive 69/335 must be interpreted as not precluding the charging of capital duty on the amount of interest saved by a company by virtue of an interest-free loan granted to it by its members where a profit and loss

transfer agreement was entered into by the members and the company before the loan was granted, if the interest thereby saved has durably increased the company's assets. It is for the national court to determine, in the light of all the characteristics of the transaction at issue, whether, and if so to what extent, the interest saved has in fact had that effect.

Costs

26 The costs incurred by the Commission, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 9 August 2000, hereby rules:

Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive

85/303/EEC of 10 June 1985, must be interpreted as not precluding the charging of capital duty on the amount of interest saved by a company by virtue of an interest-free loan granted to it by its members where a profit and loss transfer agreement was entered into by the members and the company before the loan was granted, if the interest thereby saved has durably increased the company's assets. It is for the national court to determine, in the light of all the characteristics of the transaction at issue, whether, and if so to what extent, the interest saved has in fact had that effect.

Macken Colneric Puissochet

Schintgen Skouris

Delivered in open court in Luxembourg on 17 September 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber