JUDGMENT OF THE COURT (Second Chamber)

18 January 2001 *

In Case C-113/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Herta Schmid, acting as insolvency administrator for P.P. Handels GmbH, in liquidation,

and

Finanzlandesdirektion für Wien, Niederösterreich und Burgenland,

on the interpretation of Article 10 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 (Second Chamber),

composed of: V. Skouris, President of the Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland, by K. Opl, acting as Agent,

— the Austrian Government, by C. Stix-Hackl, acting as Agent,

— the Portuguese Government, by L. Fernandes and Â. Seiça Neves, acting as Agents,

— the Commission of the European Communities, by H. Michard and A. Buschmann, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2000,

gives the following

Judgment

1 By order of 17 March 1999, received at the Court on 6 April 1999, the Verwaltungsgerichtshof (Administrative Court), Austria, referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question concerning the interpretation of Article 10 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) ('Directive 69/335').

2 That question has been raised in proceedings between Herta Schmid, acting as insolvency administrator for P.P. Handels GmbH ('the Handelsgesellschaft'), and the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Regional Tax Authority for Vienna and the States of Lower Austria and Burgenland) ('the Finanzlandesdirektion') concerning payment of minimum corporation tax.

Community law

3 The first recital in its preamble states that Directive 69/335 is intended to promote the free movement of capital as one of the essential conditions for 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, the attainment of such an objective presupposes, in regard to duty on the raising of capital, the elimination of indirect taxes hitherto in force in the Member States and the application, in their place, of a duty to be charged only once within the common market and at the same level in all the Member States.

5 Article 4(1) of Directive 69/335 provides:

'The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

(b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;

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

(d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members...

...'.

6 Article 4(1)(e) to (h) of Directive 69/335 provides that the transfer of the effective centre of management or registered office of a capital company from a non-member country to a Member State, or from one Member State to another Member State, is also to be subject to capital duty.

7 Article 4(2) of Directive 69/335 lists as follows the various transactions which may be subject to capital duty:

'(a) an increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves;

(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;

(c) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;

(d) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital.'

8 According to the final recital in its preamble, Directive 69/335 also envisages the abolition of other indirect taxes having the same characteristics as capital duty or stamp duty on securities, the retention of which might frustrate the purpose of the measures provided for in that directive. These taxes, the levying of which is to be prohibited, are listed in particular in Article 10 of Directive 69/335, which provides:

'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;

(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form.'

9 The provisions of Article 12(1) of Directive 69/335 establish an exhaustive list of taxes and duties other than capital duty which may, notwithstanding Articles 10 and 11, affect capital companies in connection with the operations referred to in those latter articles (see, in this context, Case 36/86 *Ministeriet for Skatter og Afgifter* v *Dansk Sparinvest* [1988] ECR 409, paragraph 9).

National law

10 Under Paragraph 1 of the Körperschaftsteuergesetz 1988 (Corporation Tax Law) of 7 July 1988 (*Bundesgesetzblatt* (Federal Law Gazette) No 401/1988) ('the KStG 1988'), corporations whose management or registered office is situated in Austria have unlimited liability to corporation tax. For the purposes of that provision, corporations are to be understood as being legal persons under private law, industrial or commercial enterprises of corporations governed by public law, and associations lacking legal personality, institutions, foundations, and other special-purpose bodies.

11 Under Paragraph 4(1) of the KStG 1988, legal persons governed by private law are liable to corporation tax from the time at which their instrument of constitution, such as their articles of association, deed of partnership or deed of foundation, is drawn up and they first become identifiable to third parties.

12 Under Paragraph 7(1) of the KStG 1988, corporation tax is chargeable on the basis of income received in one calendar year by corporations having unlimited tax liability. Paragraph 22(1) of the KStG 1988 provides that this tax is chargeable at a rate of 34%.

13 Paragraph 24(4) of the KStG 1988, in the version applicable in the main proceedings (*Bundesgesetzblatt* No 680/1994), provides:

'Capital companies with unlimited tax liability shall — with the exception of subsidiary companies within the meaning of Paragraph 9(2) — pay a minimum tax of ATS 3 750 in respect of each full calendar quarter during which their liability to tax is unlimited. The minimum tax shall, in so far as it exceeds actual liability to corporation tax, be taken as an advance within the meaning of Paragraph 45 of the Einkommensteuergesetz 1988 on the actual amount owing

by way of corporation tax during the assessment period or the seven following assessment periods, to the extent to which the actual amount owing by way of corporation tax exceeds the minimum tax arising under the first sentence in respect of that assessment period.'

14 In 1996 amending legislation (*Bundesgesetzblatt* No 201/1996) increased to ATS 12 500 the minimum amount of tax payable for each quarter and abolished the limitation on its set-off to the seven following assessment periods. This latter measure was extended to the years 1994 to 1996 pursuant to fresh amending legislation (*Bundesgesetzblatt* No 70/1997).

The dispute in the main proceedings and the question submitted

15 According to the order for reference, the Finanzlandesdirektion issued a notice of assessment against the Handelsgesellschaft seeking payment by it of ATS 15 000 as the minimum tax on capital companies for 1996 even though that company did not receive any income during that year.

16 The applicant in the main proceedings, who was appointed as insolvency administrator by document of 19 March 1996, lodged a complaint with the Finanzlandesdirektion challenging that notice of assessment. Following rejection of her complaint, she appealed to the Verfassungsgerichtshof (Constitutional Court), which declared that it lacked jurisdiction and referred the case to the Verwaltungsgerichtshof. Before the latter court, the applicant submitted in particular that the obligation to pay minimum tax on capital companies was incompatible with Article 10 of Directive 69/335.

17 Since it was unsure whether the minimum tax on capital companies was or was not compatible with Directive 69/335, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital preclude the levying for 1996 of the tax provided for by Paragraph 24(4) of the 1988 Körperschaftsteuergesetz (Corporation Tax Law) as amended in BGBl. (*Bundesgesetzblatt*, Federal Law Gazette) No 680/1994?'

The question submitted to the Court

18 By its question, the national court is asking essentially whether, on its proper construction, Article 10 of Directive 69/335 precludes the levying, as against insolvent capital companies lacking own revenue or whose annual revenue does not exceed a certain amount, of a minimum tax, such as that at issue in the main proceedings, payable for each quarter in respect of which those companies have unlimited liability to corporation tax.

19 It must first be noted in this regard that the transactions mentioned in Article 4 of Directive 69/335, to which Article 10(a) and (b) thereof refers, are transactions involving the transfer of capital or assets to a capital company in the taxing Member State or resulting in an effective increase in the company's capital or

assets (Case C-4/97 *Nonwoven* v *Direzione Regionale delle Entrate per la Toscana* [1998] ECR I-6469, paragraph 20).

20 It must be observed, as the Advocate General states in paragraph 14 of his Opinion, that a minimum tax on companies such as that at issue in the main proceedings is levied for each quarter during which a capital company has unlimited liability to corporation tax. It does not presuppose any transaction involving the movement of capital or assets — whether in the form of transfer or increase — and therefore does not correspond to any of the taxable transactions mentioned in Article 4 of Directive 69/335.

21 Next, it should be borne in mind that Article 10(c) of Directive 69/335 prohibits, in addition to capital duty, taxes in respect of registration or any other formality required before the commencement of business, to which a company may be subject by reason of its legal form. That prohibition is justified by the fact that even though the taxes in question are not levied on capital contributions as such, they are nevertheless levied on account of formalities connected with the company's legal form, that is to say, on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of Directive 69/335 (see, *inter alia*, Case C-19/99 *Modelo Continente* v *Fazenda Pública* [2000] ECR I-7213, paragraph 24, and Case C-134/99 *IGI — Investimentos Imobiliários* v *Fazenda Pública* [2000] ECR I-7717, paragraph 22).

22 First, it is common ground in this regard that the minimum tax on capital companies has no formal connection with the registration of companies subject to it. Registration of a company in the companies' register is not conditional on

payment of that tax and non-payment thereof does not entail the company's removal from that register.

23 Second, the minimum tax on capital companies is not connected to the completion of formalities required before the commencement of business, to which a company may be subject by reason of its legal form.

24 Finally, it should be noted that, according to its title, the directive concerns only 'indirect taxes on the raising of capital' and that, in accordance with the Court's case-law, the harmonisation provided for by Directive 69/335 does not extend to direct taxes, such as corporation tax, which are a matter for the Member States themselves (Case C-287/94 *Frederiksen* v *Skatteministeriet* [1996] ECR I-4581, paragraphs 17 and 21).

25 Since the national court found that the minimum corporation tax at issue in the main proceedings before it might, in certain cases, be classified as an indirect tax, it must be pointed out that, according to the Court's settled case-law, the nature of a tax, duty or charge falls to be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law (see, in particular, *Nonwoven*, cited above, paragraph 19).

26 In that connection, it must be observed, as the Advocate General has done in paragraph 16 of his Opinion, that the minimum tax on capital companies follows directly from the fact of a capital company having unlimited liability to corporation tax. It also appears from the arrangements governing that tax that it

constitutes an advance on the amount actually owing by way of corporation tax in respect of a given tax period. In essence, therefore, as the Advocate General points out in paragraph 17 of his Opinion, it is not a duty bearing no relation to income, as the national court has suggested.

27 It follows from all of the foregoing considerations that a minimum tax on capital companies, such as that at issue in the main proceedings, does not have the same characteristics as the taxes prohibited under Article 10 of Directive 69/335.

28 The answer to the question submitted must therefore be that, on its proper construction, Article 10 of Directive 69/335 does not preclude the levying, as against insolvent capital companies lacking own revenue or whose annual revenue does not exceed a certain amount, of a minimum tax, such as that at issue in the main proceedings, payable for each quarter in respect of which those companies have unlimited liability to corporation tax.

Costs

29 The costs incurred by the Austrian and Portuguese Governments and by the Commission, which have 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 (Second Chamber),

in answer to the question referred to it by the Verwaltungsgerichtshof by order of 17 March 1999, hereby rules:

On its proper construction, Article 10 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, does not preclude the levying, as against insolvent capital companies lacking own revenue or whose annual revenue does not exceed a certain amount, of a minimum tax, such as that at issue in the main proceedings, payable for each quarter in respect of which those companies have unlimited liability to corporation tax.

Skouris Schintgen Colneric

Delivered in open court in Luxembourg on 18 January 2001.

R. Grass

Registrar

V. Skouris

President of the Second Chamber