JUDGMENT OF THE COURT (Sixth Chamber)
27 October 1998 *

In Case C-4/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Commissione Tributaria Provinciale di Firenze (Italy) for a preliminary ruling in the proceedings pending before that court between

Manifattura Italiana Nonwoven SpA

and

Direzione Regionale delle Entrate per la Toscana

on the interpretation 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),

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. F. Mancini, J. L. Murray, H. Ragnemalm (Rapporteur) and K. M. Ioannou, Judges,

* Language of the case: Italian.

Advocate General: N. Fennelly,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Manifattura Italiana Nonwoven SpA, by Aldo Bompani, Sergio Calamandrei, Gino Manfriani and Luca Noferi, *dottori commercialisti*, and Giorgio Bompani and Giuliano Danna, of the Florence Bar,

— the Italian Government, by Umberto Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by Gianni de Bellis, Avvocato dello Stato,

— the Greek Government, by Georgios Kanellopoulos, Deputy Legal Adviser to the State Legal Council, and Anna Rokofyllou, Adviser to the Deputy Minister for Foreign Affairs, acting as Agents,

— the Commission of the European Communities, by Enrico Traversa, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Manifattura Italiana Nonwoven SpA, the Italian and Greek Governments and Commission at the hearing on 7 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 18 June 1998,

gives the following

Judgment

1 By order of 18 October 1996, received at the Court on 9 January 1997, the Commissione Tributaria Provinciale di Firenze (Provincial Tax Court, Florence) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question concerning the interpretation 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) ('the Directive').

2 That question has arisen in a dispute between Manifattura Italiana Nonwoven SpA ('Nonwoven') and the Direzione Regionale delle Entrate per la Toscana (Regional Revenue Directorate for Tuscany) ('the revenue authority') concerning Nonwoven's application for reimbursement of an amount paid as tax on companies' net assets.

3 The Directive is aimed in particular at achieving harmonisation of the factors involved in the fixing and levying of capital duty in the Community, by means of the elimination of tax obstacles which interfere with the free movement of capital (see, *inter alia*, Case C-347/96 *Solred* v *Administración General del Estado* [1998] ECR I-937, paragraph 3).

4 Article 4(1) of the Directive provides as follows:

'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 ...'

5 Article 4(1)(e) to (h) of the Directive provides that the transfer from a non-member country to a Member State of the effective centre of management or the registered office of a capital company is also subject to capital duty.

6 Article 4(2) of the Directive lists 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.'

7 Under Article 7(2) of the Directive, Member States may either exempt from capital duty certain transactions referred to therein or charge duty on them at a single rate not exceeding 1%.

8 In accordance with the final recital in its preamble, the Directive also provides for 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 the Directive. Those taxes, levying of which is prohibited, are set out, *inter alia*, in Article 10 of the Directive, which reads 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;

(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 By Decree-Law No 394 of 30 September 1992 (GURI No 230 of 30 September 1992), a tax on companies' net assets was introduced into the Italian tax system. Those subject to this tax include capital companies, cooperative companies, mutual insurance companies, public and private bodies which are not companies but which have as their exclusive and/or main purpose the exercise of commercial activities, as well as natural persons engaged in activities generating corporate revenue.

10 The base of the tax consists of the net assets, as set out in the end-of-year balance sheet, less the profits for that year, comprising, in particular, the following elements:

— subscribed capital, even if not yet paid up, as well as payments made by members into a sinking fund or on capital account;

— various reserves: statutory reserves or reserves required under the statutes of the company, share premium reserves or reserves in respect of own shares in portfolio, reserves linked to reinvestment, and other reserves or funds;

— provisions for risks and charges and for future investments;

— profits carried over from previous financial years;

— losses for the present financial year and those carried over from previous financial years.

11 Holdings in the form of shares held for at least three months at the end of the financial year in companies which are themselves subject to the tax on companies' net assets are deducted from the taxable assets.

12 The rate of the tax is fixed at 0.75% of the net assets at the end of the taxable period.

13 Recovery procedures and disputes are governed by the rules applicable to revenue tax.

14 After obtaining no response from the revenue authority to its request for repayment of the sum of LIT 93 063 000 which it had had to pay in respect of tax on its net assets for the 1992 and 1993 tax years, Nonwoven instituted proceedings before the Commissione Tributaria Provinciale di Firenze on 30 November 1994 against the implied refusal of that request.

15 In support of its action, Nonwoven argued that the tax on companies' net assets was unlawful on the ground that it was levied on capital which had already been subject to a registration charge when brought into the company. Consequently, the tax contravened the prohibition in the Directive of making the raising of capital subject to any charge other than capital duty.

16 The revenue authority contested that argument. It maintained that the tax on companies' net assets was a direct tax, that it would be wrong to construe it as amounting, from the legal and economic point of view, to an indirect tax, and that, by its nature, the tax fell outside the scope of the Directive.

17 In light of the arguments presented to it, the national court formed the view that determination of the case depended primarily on the reply to the question whether the Directive was applicable for the purpose of ruling on the claim for repayment, even though the tax on companies' net assets was unanimously classified as a direct tax. The Commissione Tributaria Provinciale di Firenze accordingly decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a statutory tax on the net assets of companies with share capital which has effects economically equivalent to those of an indirect tax on capital contributions compatible with Community law and in particular with Directive 69/335/EEC?'

18 The national court is therefore essentially asking whether the Directive precludes the levying on capital companies of a tax such as the Italian tax on companies' net assets.

19 Since the national court states that the tax on companies' net assets is unanimously classified as a direct tax, it must be observed first of all that, according to settled case-law, the nature of a tax, duty or charge must 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 (Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 39, and the case-law there cited).

20 As far as the objective characteristics of the tax at issue are concerned, as the Advocate General states in paragraph 14 of his Opinion, the various transactions which, in accordance with Article 4(1) of the Directive, must be subjected to capital duty are all transactions involving the transfer of capital or assets to a capital company in the taxing Member State. Similarly, the categories of transaction which, under

Article 4(2), may be subject to capital duty all result in an effective increase in the company's capital or assets.

21 A tax on assets such as that at issue, on the other hand, is levied annually, at the end of the financial year, on the net assets of companies as set out in their balance sheets. It does not presuppose any transaction involving the movement of capital or assets and thus does not correspond to any of the taxable transactions mentioned in Article 4 of the Directive, to which Article 10(a) and (b) refers.

22 Second, while it is true that the base of the tax at issue takes into account the amount of capital subscribed, which must or may be subject to capital duty, that capital is only one component of a company's net assets: the tax base consists of the sum of several accounting items, including reserves or funds as well as profits carried over from previous years and losses, both those of the present financial year and those of previous financial years.

23 Thus, such a tax, unlike capital duty on capital-raising transactions, is levied on the net assets of capital companies, that is to say, on the total assets and liabilities of those companies, as defined by national legislation. Consequently, and contrary to the arguments put forward by Nonwoven, the tax at issue in the main proceedings does not involve an increase in the rate of capital duty or a fresh levying of such duty.

24 It follows that a tax such as that at issue in the main proceedings is neither a capital duty nor a tax having the same characteristics as such a duty.

25 The answer to the question submitted must therefore be that the Directive does not preclude the levying on capital companies of a tax such as the Italian tax on companies' net assets.

Costs

26 The costs incurred by the Italian and Greek 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 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 question referred to it by the Commissione Tributaria Provinciale di Firenze by order of 18 October 1996, hereby rules:

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 on capital companies of a tax such as the tax on companies' net assets.

Kapteyn Mancini Murray

Ragnemalm Ioannou

Delivered in open court in Luxembourg on 27 October 1998.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber