provisions of the company's documents of constitution in order to establish whether that is the case.

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 15 July 1982.

J. A. Pompe
Deputy Registrar

A. Touffait
President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 17 JUNE 1982

My Lords,

This case has been referred to the Court by the Finanzgericht, Hamburg, for preliminary rulings on the interpretation of Article 5 (2) of Council Directive 69/335 of 17 July 1969 concerning Indirect Taxes on the Raising of Capital, Official Journal, English Special Edition 1969 (II) p. 412.

The plaintiff is the Kommanditgesellschaft Felicitas Rickmers-Linie KG & Co. A Kommanditgesellschaft is a form of limited partnership consisting of one or more general partners, whose liability is unlimited, and one or more limited partners, whose liability is limited to the amount of their contributions to the partnership property, as recorded in the commercial register.

At all material times a general partner in the plaintiff company was another Kommanditgesellschaft, the Rickmers-Linie KG which I shall call "the upper Kommanditgesellschaft". The defendant is the Tax Office for Transfer Duties in Hamburg.

On 10 April 1974 a company limited by shares, Hapag Lloyd AG, became a general partner in the upper Kommanditgesellschaft. The defendant took the view that this was a transaction which required capital duty to be paid in

respect of the plaintiff's capital by virtue of the Law on Capital Transactions Tax of 17 November 1972, BGBl. I, p. 2129, which it is accepted was designed to implement Council Directive 69/335.

Section 2 (1) of the Law provides that the acquisition of membership rights in a domestic capital company, by the person first acquiring those rights, shall be a transaction subject to capital duty. Section 5 (1) of the Law defines a "capital company" as including a company limited by shares (aktiengesellschaft). Section 5 (2) (3) of the Law provides that a Kommanditgesellschaft shall be deemed to be a capital company if it has among its general partners a capital company within the meaning of the previous subsection or a Kommanditgesellschaft which is itself deemed to be a capital company.

The defendant's reasoning is that on the entry of Hapag Lloyd AG to the upper Kommanditgesellschaft, the latter was deemed to be a capital company and accordingly when that event happened the plaintiff in turn was deemed to be a capital company under Section 5 (2) (3) of the Law. The plaintiff's limited partners consequently acquired on that date rights in a capital company under Section 2 (1).

Section 8 of the Law so far as relevant provides that capital duty is to be calculated by reference to the rights in the company, but that in so far as the rights in the company have a nominal value, the value of the rights is to be taken to be at least the nominal value less any outstanding contributions.

Sections 2 (1), 5(1), 5(2) (3) and 8 of the Law are said to correspond respectively to Article 4 (1) (b), 3(1) (a), 3 (2) and 5 of the directive.

It is found by the court making the reference that by reason of losses incurred at the relevant time, the actual value of the limited partner's shares in the company was nil. The defendant, however, assessed capital duty at the rate of 1 % of the total value of the limited partners' registered contributions to the partnership property at the material date, so producing a liability of DM 64 800.

The plaintiff challenged that assessment before the Finanzgericht. That court is inclined to the view that no duty is to be assessed on the value of the limited partners' contributions, since limited partners' shares in a Kommanditgesellschaft have no "nominal value" within Section 8 of the Law.

On the face of it, as the Finanzgericht observes, the issue appears to raise a question of German law. On the other hand that court took the view that since the directive was "directly applicable", and since in any event the Law was intended to implement the directive, the real question concerned the meaning of the directive and in particular Article 5 (2) which, at the material date, read, in part, as follows:

"the amount on which the duty is charged shall not ... be less than the actual value of the shares in the company allotted or belonging to each member or the nominal amount of such shares if the latter exceeds their actual value".

The plaintiff argued, on the basis of Article 4 (1) of the directive, read with Article 3 (2) thereof, that there was in this case no transaction subject to capital duty under those articles. The admission of a capital company to membership of a Kommanditgesellschaft which is and at

all material times has been a general partner in another Kommanditgesellschaft does not amount to the conversion of the latter into a capital company. The Finanzgericht took the view that this argument ran counter to certain decisions of the Bundesfinanzgericht, which it appears to have accepted as authoritative. The Finanzgericht did not, however, refer this preliminary issue to the Court and it would accordingly be inappropriate to comment on it.

Instead, the first question referred by the Finanzgericht asks whether a share in a Kommanditgesellschaft has a nominal amount within the meaning of Article 5 (2) and, if so, what element represents that amount. The second asks whether Article 5 (2) of the directive is directly applicable in the sense that a taxpayer may rely on it before a court so as to be taxed in accordance with it.

Leaving aside any question of "direct applicability" it seems to me that once it is accepted that the Law was intended to give, and did give, effect to the directive, the national court is entitled to ask questions as to the proper construction of the directive, as a matter of Community law. The question as framed seems to me to involve questions both of Communtity law and of matters to be decided by the national court and it is of course for this Court to answer only the former.

In my view, the definition of the phrase "nominal amount" in Article 5 (2) of the directive is essentially a question of Community law to be resolved in the final analysis by this Court. The relevant criteria do not fall to be established by national but by Community law (see e.g. Case 161/78 *Conradsen* v *Ministeriet for Skatter og Afgifter* (1979) ECR 2221 at pp. 2244 and 2245) as otherwise unacceptable variations in approach within the Community could arise. The application of the definition, given by Community law, falls within the province of the national courts. This Court having identified the characteristics of a "nominal amount" in terms independent of national law, it is, as I see it, for the national court to decide whether national law attributes such characteristics to shares in companies or partnerships established under national law.

It does not seem to me that Article 5 (2) is to be construed as meaning that every type of organism which is included in the extensive definition of "capital company" has, or is to be treated as having, shares with a "nominal amount". The proper construction of Article 5 (2) in my view is that the actual value of the shares is to be taken unless (a) those shares have a nominal amount and (b) that nominal amount exceeds the actual value of the shares. The Law on Capital Transactions Tax expressly contemplates (by the words in Section 8 "in so far as the rights in the company have a nominal value") the possibility that membership rights may have no nominal value. In this respect, it accurately reflects the directive.

The starting point is thus that some capital companies will not have shares bearing a nominal amount and others will.

The characteristics of a "nominal amount" within the meaning of Article 5 (2) of the directive must be ascertained

having regard to the objectives of the directive and the context in which the phrase appears. As is indicated in the title to the directive, and in the sixth and tenth recitals thereto, its object is to promote the free movement of capital by harmonizing the rules governing taxes on the raising of capital. The taxes on the raising of capital are identified as including "the duty chargeable on the contribution of capital to companies and firms". By Article 1 Member States are to charge "on contributions of capital to capital companies" a duty harmonized as there provided and called a "capital duty".

For the second part of Article 5 (2) to apply the shares (in the sense of "parts sociales" rather than "actions") must have been "allotted to" or "belong to" the members. The latter category, I assume, is intended to refer to shares which after allotment have been transferred. There must, therefore, be a recognizable allotment or allocation of a defined interest in the company. The nominal amount of such interest must as I see it, be expressed in money, whether or not identified as a share or unit (or a number of shares or units) or as an ascertained or ascertainable part of the company's capital expressed as a sum of money. Such nominal amount must be a fixed amount which will not vary according to the fortunes of the company. It does not accordingly fall to be ascertained by reference to the value of the assets of the company or to the realizable value of the members' interest itself. Nor does it fall to be decided by reference to the liability of the company to outsiders or to the extent of the liability of the members to outsiders as such. It must be an identified amount which will normally be stated in a company document such as the company's memorandum or articles of association or deed of formation or the document allotting the shares or in a commercial or companies register. It may or may not be a figure or a minimum figure prescribed by law.

In the ordinary way the nominal amount of the members' shares will be the sum, or the value of the assets, which have been contributed by the members, taken at the time the contribution is made: it will also include the sum which a member is liable to pay but has not yet paid, though Member States have a discretion under Article 5 (1) (a) to postpone the charging of duty until contributions which a member is liable to make have been effected.

I say "in the ordinary way" because the directive contemplates consideration of three separate figures for the purpose of calculating duty, any one of which can be higher than the other two. The first is to be found in Article 5 (1) (a) namely, "the actual value of assets of any kind contributed or to be contributed by the members, after the deduction of liabilities assumed and of expenses borne by the company as a result of each contribution"; secondly, "the actual value of the shares in the company allotted or belonging to each member"; thirdly the nominal amount of such shares which have been allotted or which belong to a member. Such amount, expressed in relation to the shares in money terms, may, therefore, if national law so permits, be different from and higher than the net amount of the contribution (i.e. the value of assets contributed less the specified deductions).

It is for the national court to decide whether the association existing under national law has allotted shares having "a nominal amount" and what that amount is on the basis of these criteria.

I realize that this approach makes it inevitable that enquiries will be made into individual companies to determine whether their allotted shares have "nominal amounts" whenever such companies are formed in accordance with a national law which permits them to possess the characteristics described above but does not compel them to do so. Given the divergences which exist between the company law of Member States and the range of variations in the structure of an association even within a Member State, I do not think it possible to avoid this if "nominal amount" is to be interpreted in a uniform way throughout the Community. Accordingly I do not find it possible, nor on the material available to the Court do I think it right, to say in absolute terms that all Kommanditgesellschaften do or do not have shares having a nominal amount. This conclusion as I understand it, was in the end adopted by counsel for the defendants though initially his case had been put more broadly. It is for the national court to investigate the particular association.

I do not consider that the second question arises in this case. For the reasons given in my opinion in Case 8/81 *Becker* v *Finanzamt Münster-Innenstad* (18 November 1981, not yet reported) the question of direct effect in relation to a directive only falls for decision where an individual is seeking to rely on a directive, the terms of which are sufficiently clear and obligatory on a Member State, against a Member State which has failed to implement it. Here it is accepted that the Federal Republic of Germany has implemented the measure and is in no way in breach of its obligations. The construction of Article 5 in general is a legitimate matter to refer to this Court, since the German law must be interpreted in the same way as the directive. The plaintiff can rely on the German law and does not need a directive as such. Although the plaintiff argued here that Article 5 (2) does have direct effect, it is really the defendant which is seeking to rely on the directive or at any rate German law incorporating the terms of the directive.

I am accordingly of the opinion that the first question should be answered on the basis that it is for the German court to decide whether in this particular case the plaintiff has allotted to members shares or an interest having a face value expressed in money terms which is fixed, and which does not vary according to the asset value of the Company or the realizable value of the shares or interest from time to time.

The second question does not in my opinion arise.