JUDGMENT OF THE COURT (Fourth Chamber)

21 June 2007 *

In Case C-366/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Supremo Tribunal Administrativo (Portugal), made by decision of 6 July 2005, received at the Court on 29 September 2005, in the proceedings

Optimus — Telecomunicações SA

v

Fazenda Pública,

intervening party:

Ministério Público,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, E. Juhász (Rapporteur), R. Silva de Lapuerta, G. Arestis and T. von Danwitz, Judges,

* Language of the case: Portuguese.

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2006,

after considering the observations submitted on behalf of:

— Optimus — Telecomunicações SA, by J. Vieira Peres and C. Botelho Moniz, advogados,

— the Portuguese Government, by L. Fernandes, S. Vasques and A. Ferreira, acting as Agents,

— the Commission of the European Communities, by R. Lyal and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 January 2007,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 7(1) 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 The reference was made in proceedings between Optimus — Telecomunicações SA ('Optimus') and the Portuguese tax authorities on the subject of payment of 'stamp duty' demanded in respect of an increase in share capital paid in cash.

Legal context

Community legislation

3 According to the first recital of its preamble, the intention of Directive 69/335 is to promote the free movement of capital, which is considered to be a fundamental freedom essential to the creation of an internal market. To that end, as is clear from the sixth to eighth recitals, that directive seeks to harmonise the duty chargeable on contributions of capital to companies and firms in the European Economic Community by means of the establishment of a single duty on the raising of capital which can be charged only once within the common market and by means of the abolition of all other indirect taxes having the same characteristics as that single duty.

4 For that purpose, Articles 1 to 9 of Directive 69/335 provide for the charging of a harmonised duty on contributions of capital to capital companies, called 'capital duty'.

5 Article 4(1) of that directive contains a list of transactions which Member States must subject to capital duty. Within that list appears, under (c), 'an increase in the capital of a capital company by contribution of assets of any kind'. Article 4(2)

contains a list of transactions which Member States may subject to capital duty. Member States also had the option, as provided by Article 7(4) of Directive 69/335, in its original version, of applying a reduced rate of capital duty to transactions which fell within Article 4(2).

6 The rates of capital duty are set in Article 7 of Directive 69/335. Under Article 7(1)(a) of Directive 69/335 in its original version, the rate of capital duty 'may not exceed 2% or be less than 1%', and under Article 7(1)(b), 'this rate shall be reduced by 50% or more when one or more capital companies transfer all their assets and liabilities, or one or more parts of their business to one or more capital companies which are in the process of being formed or which are already in existence'. The latter relates to company merger transactions and the reduction in the rate of capital duty is subject to certain conditions.

7 Article 8 of Directive 69/335 allows Member States the option of partially or totally exempting from capital duty the transactions referred to in Article 4(1) and 4(2) relating to capital companies which supply public services, provided that the State or regional or local authorities own at least half of the company's share capital, and to capital companies which pursue cultural, charitable, relief or educational objectives.

8 Article 9 of Directive 69/335 contains a general exception clause, in the following terms: '[c]ertain types of transactions or of capital companies may be the subject of exemptions, reductions or increases in rates in order to achieve fairness in taxation, or for social considerations, or to enable a Member State to deal with special situations'.

9 Lastly, Article 10 of Directive 69/335 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;

...

(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.'

10 Council Directive 73/79/EEC of 9 April 1973 (OJ 1973 L 103, p. 13) extended the scope of the reduced rates of capital duty. A subparagraph (bb) was inserted in Article 7(1) of Directive 69/335 in its original version, conceding to Member States the possibility of extending the treatment of company merger transactions, namely reducing the rate of capital duty by 50% or more, to transactions 'where a capital company which is in the process of being formed or which is already in existence acquires shares representing at least 75% of the issued share capital of another capital company'. That reduction in the rate of capital duty or that exemption from the duty was subject to certain conditions.

11 Council Directive 73/80/EEC of 9 April 1973 fixing common rates of capital duty (OJ 1973 L 103, p. 15) introduced, as from 1 January 1976, a general lowering of the rates of capital duty. Thus the full rate was fixed at 1% and Member States had the option of fixing the reduced rates as provided for in Article 7(1)(b) and Article 7(1)(bb) of Directive 69/335, as amended by Directive 73/79, between 0% and 0.50%.

12 Lastly, Council Directive 85/303 introduced substantial amendments to Directive 69/335. Directive 85/303 is based on the premiss that capital duty entails economic effects which are detrimental to the regrouping and development of businesses, which were particularly sensitive in the circumstances of that time, when stimulation of investment was essential. The third, fourth and fifth recitals of the preamble to that directive state:

'... the best solution for attaining these objectives would be to abolish capital duty; ... however, the losses of revenue which would result from such a measure are unacceptable for certain Member States; ... the Member States must therefore be given the opportunity to exempt from or subject to capital duty all or part of the transactions coming within its scope, ...

... there should be mandatory exemption for the transactions currently subject to the reduced rate of capital duty;

... on 1 July 1984 no capital duty existed in Greece; ... for this reason, provision should be made for the possibility of introducing such duty in Greece and of exempting certain transactions from it'.

13 In accordance with Article 1 of Directive 85/303, the amendments made to Directive 69/335 are the following:

'[in] Article 4(2):

— the introductory phrase is replaced by the following:

"2. 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:"

— the following subparagraph is added at the end:

"However, the Hellenic Republic shall determine which of the transactions listed above it will subject to capital duty";

(2) Article 7 is replaced by the following:

"Article 7

1. Member States shall exempt from capital duty transactions, other than those referred to in Article 9, which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less.

The exemption shall be subject to the conditions which were applicable, on that date, for the grant of the exemption or, as the case may be, for imposition at a rate of 0.50% or less.

The Hellenic Republic shall determine which transactions it shall exempt from capital duty.

2. Member States may either exempt from capital duty all transactions other than those referred to in paragraph 1 or charge duty on them at a single rate not exceeding 1%.

..."

(3) In Article 8, the introductory phrase shall be replaced by the following:

"Subject to Article 7(1), Member States may exempt from capital duty the transactions referred to in Article 4(1) and (2) concerning: ..."'.

14 The time-limit for transposition of Directive 85/303 was fixed at 1 January 1986.

The national legislation

15 It is apparent from the documents before the Court that the legislation of the Portuguese Republic relating to the taxation of capital companies (the General Table of Stamp Duty, annexed to the Stamp Duty Code), as amended by Decree Law No 257/81 of 1 September 1981, subjected transactions which enlarged or increased the capital of capital companies to a tax, called 'stamp duty', equivalent to 1% of the amount involved.

16 Decree Law No 154/84 of 16 May 1984, which entered into force on 21 May 1984, introduced a derogation for share capital increase transactions which were paid in cash, by providing for their exemption from stamp duty.

17 Lastly, Decree Law No 322-B/2001 of 14 December 2001, which entered into force on 1 January 2002, reintroduced the generalised taxation of transactions involving increases in the capital of capital companies by contribution of assets of any kind, at 0.40% of the real net value of the assets contributed or to be contributed by the shareholders.

18 The Portuguese Republic joined the European Communities on 1 January 1986.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 Optimus, the principal place of business of which is in the Portuguese Republic, increased its share capital by EUR 100 000 000, all of which was paid in cash. When,

on 12 November 2002, that increase in capital was recorded by a notarially attested document, the company was required to pay stamp duty of 0.40%, that is, EUR 400 000, in accordance with Decree Law No 322-B/2001.

20 That assessment of liability to stamp duty was challenged by Optimus before the Tribunal Tributário de Primeira Instância do Porto (Tax Court of first instance of Porto), now called the Tribunal administrativo e fiscal do Porto (Administrative and Tax Court of Porto), on the ground that it infringed Article 7(1) of Directive 69/335, and that the obligation prescribed in that provision prevented the Portuguese Republic from taxing, by application of Decree Law No 322-B/2001, the increase in share capital concerned, since, on 1 July 1984, the relevant date fixed in the provision of Community law under consideration, Portuguese legislation exempted from stamp duty transactions increasing the capital of commercial companies which were paid in cash.

21 The Tribunal administrativo e fiscal do Porto dismissed the action, on the ground that the obligation prescribed in Article 7(1) of Directive 69/335 did not apply to the transactions referred to in Article 4(1), but only to those referred to in Article 4(2) and Article 8 of that directive. When an appeal against that decision was brought by Optimus, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 7(1) of Directive 69/335 ..., as amended by Directive 85/303 ..., be interpreted restrictively so as to impose, as a precondition for the obligation which it imposes on Member States to exempt certain transactions involving the raising of capital, the requirement that the transactions in question must be those which, under the wording of the directive prior to 1985, could be exempted or taxed at a reduced rate — that is to say only those referred to in Article 4(2) and Article 8 — and which, in addition, were in that situation as at 1 July 1984?

(2) Must Article 7(1) of Directive 69/335 ..., as amended by Directive 85/303 ... and Article 10 thereof be interpreted to the effect that they prohibit the levying of stamp duty, by virtue of national legislation such as Decree Law No 322-B/2001 of 14 December 2001, which inserted paragraph 26 — Capital Duty — in the General Table of Stamp Duty, on a limited company governed by Portuguese law when its capital is increased, by payments in cash, when, as at 1 July 1984, that transaction was subject to that duty but was exempted from it?'

The questions referred for a preliminary ruling

The first question

22 By that question, the referring court is asking, in essence, whether Article 7(1) of Directive 69/335 must be interpreted to mean that the mandatory exemption stipulated there relates only to transactions which fall within Article 4(2) and Article 8 of that directive, and to the extent that those transactions were exempted or taxed at a reduced rate less than or equal to 0.50% at the date of 1 July 1984.

23 The Portuguese Government, supported by the Commission of the European Communities, argues on that point that Article 4 of Directive 69/335, in its original version, made a distinction between transactions falling under Article 4(1), on which the imposition of capital duty was mandatory, and those falling under Article 4(2), on which it was merely optional. Accordingly the exemption required by Article 7(1) of Directive 69/335, as amended by Directive 85/303, applies only to transactions which, before the entry into force of the latter directive, could benefit from exemption or taxation at a lower rate, which is to say, transactions falling within Article 4(2) of Directive 69/335.

24 Optimus contends on the other hand that now, following the amendments made by Directive 85/303, the principal objective of Directive 69/335 is the elimination of capital duty, and not merely the harmonisation of national legislation. Accordingly, in the light of that objective and of the principle of free movement of capital, Article 7(1) should be interpreted broadly to mean that the mandatory exemption provided for there also applies to transactions falling under Article 4(1) of Directive 69/335 which, like the transaction in the main proceedings, were exempt from capital duty on 1 July 1984. That interpretation follows moreover from the wording of Article 7(1), which lays down on that point a clear and unconditional obligation for Member States.

25 In order to answer that question from the referring court, account must be taken, when considering the interpretation and application of Directive 69/335, of the particular situation of a State such as the Portuguese Republic which became a member of the European Communities with effect from 1 January 1986.

26 It follows, in the first place, from that fact that Directive 69/335 was not applicable in that State before that date. Any measures relating to the taxation or exemption from taxation of transactions falling within the definition of the raising of capital were adopted within the Portuguese legal system, before the date referred to above, solely on the basis of national law.

27 The second consequence of that fact is that, for the purposes of the interpretation and application of Directive 69/335 as it relates to the Portuguese Republic, a historical interpretation of the objectives of that directive cannot affect the interpretation of the directive as it applied after the accession of that State. To that extent, the budgetary reasons which prevented certain Member States, before 1 January 1986, from agreeing to the elimination of capital duty cannot be invoked in the case of the Portuguese Republic.

28 It should be added that the date on which the accession of the Portuguese Republic to the Communities took effect, namely 1 January 1986, coincides with the time-limit set for transposition of the substantial amendments made to Directive 69/335 by Directive 85/303. Moreover, there is no provision in the Act concerning the conditions of accession of the Kingdom of Spain and of the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23), or in any other document, which fixes, for the latter State, a time-limit for transposition which differs from that in Directive 85/303. Consequently, the only version of Directive 69/335 which applies to the Portuguese Republic is that established by Directive 85/303.

29 That finding is corroborated by the fact that Article 4(2) and the third subparagraph of Article 7(1) of Directive 69/335 contain derogations in favour of the Hellenic Republic as to the application of that directive. However, no such derogations are provided for the Portuguese Republic.

30 The first subparagraph of Article 7(1) of Directive 69/335 sets out a clear and unconditional obligation, on the part of Member States, to exempt from capital duty transactions which, on 1 July 1984, were exempted or taxed at a rate of 0.50% or less. That obligation, the meaning of which is unambiguous, was also binding on the Portuguese Republic as from 1 January 1986.

31 That interpretation corresponds not only to what is clearly the letter of Article 7(1), but also to the spirit and primary objective of Directive 69/335, which, as the Advocate General at point 59 of her Opinion justifiably observes, was to minimise the effects of capital duty on the free movement of capital as far as possible (see, to that effect, Case C-494/03 *Senior Engineering Investments* [2006] ECR I-525, paragraph 43).

32 Lastly, it must be observed that the date of 1 July 1984, which is taken as the relevant date under Article 7(1) of Directive 69/335, is equally applicable to the Portuguese Republic. In the case of accession, a reference to a date laid down in Community law, in the absence of a provision to the contrary in the Act of Accession or some other Community document, applies equally to the State which is acceding, even if that date is earlier than the date of its accession. As regards the Portuguese Republic, no provision which differs on that point is to be found either in the Act of Accession or in any other document. Such a provision would however have been possible, as is shown by the derogating provisions in favour of the Hellenic Republic.

33 It follows from the foregoing that, in the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, in the absence of derogating provisions in the Act of Accession of that State or in another Community document, Article 7(1) of Directive 69/335 must be interpreted to mean that the mandatory exemption for which it provides applies to all the transactions falling within the scope of that directive which, on 1 July 1984, were exempted, in that State, from capital duty or which were subject to that duty at a reduced rate of 0.50% or less.

The second question

34 By its second question, the referring court asks, in essence, whether, in the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, Articles 7(1) and 10 of Directive 69/335 must be interpreted as prohibiting the introduction, after 1 January 1986 of a stamp duty on a transaction increasing share capital falling within the scope of that directive which, on 1 July 1984, was exempt from that duty under national law.

35 It is common ground that, on 1 July 1984, an increase in share capital which was paid in cash was, under Portuguese law, exempt from the stamp duty exacted as a matter of course on increases in share capital effected by other means.

36 The Portuguese Government argues nonetheless that stamp duty was not the only instrument for the taxation of capital raising transactions which existed at that time within the Portuguese legal system. Those transactions were, in fact, also subject in a cumulative manner to registration fees and notarial fees. The former category of fees, namely those required for the recording of the document relating to the transaction in question in the Commercial Register, was a progressive form of taxation the rates of which varied between 1% on transactions not exceeding PTE 200 000 and 0.30% on those where the amount involved exceeded PTE 10 000 000. Notarial fees were also progressive.

37 Accordingly, as is argued by the Portuguese Government, registration fees and notarial fees, in their cumulative effect, represented, on 1 July 1984, a tax equivalent to 0.60% of the amounts involved and therefore exceeded the limit of 0.50% provided for in Article 7(1) of Directive 69/335. Consequently, since, in accordance with the case-law of the Court, those fees constituted taxes which had the same characteristics as capital duty, the Portuguese authorities could have reintroduced, after 1 January 1986, a stamp duty equivalent to capital duty.

38 That argument cannot be accepted.

39 It must be pointed out in that connection that, as is clear from the second, sixth, seventh and eighth recitals in its preamble, Directive 69/335 has, since its original

version, had as its objective the establishment, instead of the capital duty and stamp duty charged within Member States, of a single harmonised duty on capital-raising transactions within the common market together with the abolition of all other indirect taxes with the same characteristics as capital duty or stamp duty.

40 That clear distinction between capital duty, to be applied at harmonised rates, and other taxes with the same characteristics as that duty, which are prohibited, has been set out unambiguously in the provisions of Directive 69/335 since its adoption. Thus, Article 4 of that directive lists the transactions which must or may be subjected to capital duty and Article 10 prohibits Member States from charging, apart from capital duty, any other tax, in any form whatsoever, on those transactions.

41 The distinction in question was clearly observed at all stages of the legislative evolution of Directive 69/335. Directive 73/79 extended the scope of the reduced rates of capital duty, Directive 73/80 provided for a general lowering of the rates of duty and Directive 85/303 marks a clear intention to extend the exemption from capital duty to as large a number as possible of the transactions which fall within the scope of that duty. On the other hand, the evolution of the legislation did not in any way alter the original objective, that is, the abolition and total prohibition of any other tax having the same characteristics as capital duty.

42 In addition, it must be noted that Article 7(1) of Directive 69/335 aims solely to regulate the application of capital duty or stamp duty, not the application of taxes other than those duties. Consequently, when that provision refers to transactions 'which were, as at 1 July 1984, exempted or taxed at a rate of 0.50% or less', the

reference is to transactions which were at that time exempted from capital duty or stamp duty or subject to those duties at a rate lower than 0.50%.

43 In the present case, it is common ground that the registration fees and the notarial fees to which the Portuguese Government refers do not constitute either a capital duty or a stamp duty, but another type of taxation.

44 In that connection it must be pointed out that, in Case C-206/99 *SONAE* [2001] ECR I-4679 and in the order of 24 January 2002 in Case C-45/00 *SONAE Turismo*, not published in ECR, the Court ruled that charges levied in the Portuguese Republic for recording in a national Commercial Register an increase in the share capital of a capital company falling under Directive 69/335 constituted a tax within the meaning of that directive and, as such, they were prohibited by Article 10(c) of that directive. In Case C-56/98 *Modelo* [1999] ECR I-6427 and Case C-19/99 *Modelo* [2000] ECR I-7213, the Court arrived at the same conclusion with regard to the fees levied in the Portuguese Republic for drawing up notarially attested documents recording an increase in a company's share capital which fell under Directive 69/335.

45 It would therefore be contrary both to the wording of Article 7(1) of Directive 69/335, and to the objectives of that directive, to reintroduce into the Portuguese legal system, after 1 January 1986, a stamp duty on increases in the share capital of capital companies, within the meaning of Directive 69/335, paid in cash, when such a duty was not imposed on such transactions on 1 July 1984, by relying, as justification for that reintroduction, on the fact that, in that Member State those transactions gave rise, on that date, to the charging of fees which have been considered by the Court to be prohibited by Directive 69/335.

46 It follows, accordingly, from the foregoing that, in the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, Articles 7(1) and 10 of Directive 69/335 prohibit the introduction, after 1 January 1986, of stamp duty on a transaction increasing share capital falling within the scope of that directive which, on 1 July 1984, was exempted from that duty under national law.

Costs

47 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **In the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, in the absence of derogating provisions in the Act of Accession of that State or in another Community document, Article 7(1) 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 to mean that the mandatory exemption for which it provides applies to all transactions falling within the scope of Directive 69/335 which, on 1 July 1984, were exempted, in that State, from capital duty or which were subject to that duty at a reduced rate of 0.50% or less.**

2. **In the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, Articles 7(1) and 10 of Directive 69/335, as amended by Directive 85/303, prohibit the introduction, after 1 January 1986, of stamp duty on a transaction increasing share capital falling within the scope of Directive 69/335 which, on 1 July 1984, was exempted from that duty under national law.**

[Signatures]