JUDGMENT OF THE COURT (Fourth Chamber)

8 November 2007 *

In Case C-251/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Finanzsenat, Außenstelle Linz (Austria), made by decision of 31 May 2006, received at the Court on 6 June 2006, in the proceedings

Firma ING. AUER — Die Bausoftware GmbH,

v

Finanzamt Freistadt Rohrbach Urfahr,

THE COURT (Fourth Chamber),

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

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 March 2007,

after considering the observations submitted on behalf of:

— Firma ING. AUER — Die Bausoftware GmbH, by J. Wiedlroither and G. Aigner, Rechtsanwälte,

— the Austrian Government, by C. Pesendorfer, G. Glega and J. Bauer, acting as Agents,

— the Greek Government, by I. Pouli and M. Tassopoulou, acting as Agents,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

— the Commission of the European Communities, by M. Afonso and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2007, gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1)(g), Article 4(3)(b) and Article 7(2) 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) and by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Directive 69/335').

2 The reference was made in the course of proceedings between Firma ING. AUER — Die Bausoftware GmbH ('ING. AUER — Die Bausoftware') and the Finanzamt Freistadt Rohrbach Urfahr (Tax Office, Freistadt Rohrbach Urfahr) concerning the demand by the Finanzamt for capital duty amounting to EUR 104 680.20.

Legal framework

Community legislation

3 Article 2(1) and (2) of Directive 69/335 provides:

'1. Transactions subject to capital duty shall only be taxable in the Member State in whose territory the effective centre of management of a capital company is situated at the time when such transactions take place.

2. When the effective centre of management of a capital company is situated in a third country and its registered office is situated in a Member State, transactions subject to capital duty shall be taxable in the Member State where the registered office is situated.'

4 Article 3 of Directive 69/335 states:

'1. For the purposes of this Directive, the expression "capital company" means:

(a) companies under Belgian, Danish, German, Spanish, French, Hellenic, Irish, Italian, Luxembourg, Netherlands, Portuguese and United Kingdom law known respectively as:

...

— société de personnes à responsabilité limitée/ personenvennootschap met beperkte aansprakelijkheid, Gesellschaft mit beschränkter Haftung, sociedad de responsabilidad limitada, société à responsabilité limitée, Εταιρία Περιωρισμένης Ευθύνης, società a responsabilità limitata, société à responsabilité limitée, sociedade por quotas;

companies under Austrian law known as:

— Aktiengesellschaft,

— Gesellschaft mit beschränkter Haftung;

...

2. For the purposes of the application of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company. However, a Member State shall have the right not to consider it as such for the purpose of charging capital duty.'

5 Under Article 4(1) and (3) of Directive 69/335:

'1. The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

...

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

...

(g) the transfer from a Member State to another Member State of the effective centre of management of a company, firm, association or legal person which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State;

...

3. Formation, within the meaning of paragraph 1(a), shall not include any alteration of the constituent instrument or regulations of a capital company, and in particular:

...

(b) the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company;

...'

6 Article 7(1) and (2) of Directive 69/335 provides:

'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.

...

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%.'

National laws

Austrian law

7 The legal basis for charging capital duty in Austria is contained in Part I of the Law on tax on the movement of capital (Kapitalverkehrssteuergesetz) of 16 October 1934 (deutsches RGBl. I. p. 1058/1934), as amended by the Law of 12 January 1999 (BGBl. I, 28/1999) ('the KVG').

8 Under Paragraph 2 of the KVG:

'The following shall be subject to capital duty:

...

(5) The transfer of the management or of the registered office of a foreign capital company to Austria if, by that transfer, that company becomes an Austrian company. That rule shall not apply if the company was regarded, before the transfer of its management or of its registered office, as a capital company for the purposes of charging capital duty in a Member State of the European Union.

...'

9 Paragraph 4(1) and (2) of the KVG lists the capital companies and the companies considered as such for the purposes of charging capital duty. Capital companies include, in particular, in accordance with Paragraph 4(1)(2) of the KVG, limited liability companies ('Gesellschaften mit beschränkter Haftung').

German law

10 Paragraph 4(1)(2) of the Law on the amelioration of capital market framework conditions (Law on the promotion of capital markets) (Gesetz zur Verbesserung der Rahmenbedingungen der Finanzmärkte) (Finanzmarktförderungsgesetz) of 22 February 1990 (BGBl. 1990 I, p. 266) repealed the Law on tax on the movement of capital (Kapitalverkehrssteuergesetz) of 17 November 1972 (BGBl. 1972 I, p. 2130) and, thereby, abolished capital duty, with effect from 1 January 1992.

The main proceedings and the questions referred for a preliminary ruling

11 On 9 September 1999, a company, the formation of which had been declared on 28 July 1999, was entered in the Companies Register of the Republic of Austria under the designation 'Bausoftware GmbH' ('Bausoftware'). Its sole member was Nemetschek AG ('Nemetschek'), a company governed by German law. The effective centre of management of Bausoftware was in Germany.

12 On 16 September 1999, Nemetschek transferred ATS 102 million to Bausoftware. By contract of transfer of 22 September 1999, the running of the unregistered one-man undertaking 'Ing. Auer "Die Bausoftware"' established in Mondsee (Austria) was handed over to Bausoftware.

13 That transfer was approved at the general meeting of Bausoftware which took place the same day.

14 At that meeting, Mr Auer, who resided in Austria, was appointed as additional managing director of Bausoftware and was granted a special right to manage the business. Lastly, the name of the company was changed to ING. AUER — Die Bausoftware.

15 Following an inspection carried out at the premises of that company, the Finanzamt Freistadt Rohrbach Urfahr ordered it, by decision of 6 June 2005, to pay EUR 104 680.20 in capital duty, corresponding to 1% of the value of the rights in the company, by reason of the transfer of the effective centre of management from Germany to Austria, in accordance with the provisions of the KVG.

16 Hearing the action brought by ING. AUER — Die Bausoftware against that decision, the Unabhängiger Finanzsenat, Außenstelle Linz (Independent Finance Tribunal, Linz Office) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) If the effective centre of management of a company, firm, association or legal person is transferred from a Member State which has abolished capital duty before its formation to another Member State which charges capital duty at that time, is that company, firm, association or legal person precluded from being classified as a capital company "for the purposes of charging capital duty" within the meaning of Article 4(1)(g) ... and Article 4(3)(b) of [Directive 69/335], by the fact that the first mentioned Member State has waived the charging of capital duty by repealing the relevant national legal basis for that duty?

(2) Does Article 7(2) of [Directive 69/335] prohibit the Member State to which a capital company transfers the effective centre of management, on the occasion of the transfer of the effective centre of management, from charging capital duty

on the transactions described in Article 4(1)(a) and (g) of [Directive 69/335] if the transactions took place at the time when the capital company had its effective centre of management in a Member State which, prior to the formation of the capital company, had waived the charging of capital duty by repealing the relevant national legal basis for that duty?'

Questions referred for a preliminary ruling

17 By its questions, which should be examined together, the national court is essentially asking whether the waiver by a Member State of the charging of capital duty precludes a company from being classified as a capital company 'for the purposes of charging capital duty' within the meaning of Article 4(1)(g) of Directive 69/335 if its effective centre of management is transferred from that Member State to another Member State where that duty is still levied.

18 As a preliminary point, it should be noted that the question whether the entry of Bausoftware in the Companies Register of the Republic of Austria on 9 September 1999 and whether the transfer to it of ATS 102 million by Nemetschek on 16 September 1999 can be considered to be the formation of a capital company or an increase in the capital of a capital company, and, as such, subject to capital duty in accordance with Article 4(1)(a) or (c) of Directive 69/335, is not a matter to be examined by the Court.

19 Moreover, it is settled case-law that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court

(Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12, and Case C-282/00 *RAR* [2003] ECR I-4741, paragraph 46). The Court's examination is therefore based on the national court's finding that the facts set out in paragraphs 11 to 14 of this judgment constitute a transfer of the effective centre of management from one Member State to another.

20 It emerges from the order for reference that the company at issue in the main proceedings is a limited liability company under Austrian law.

21 Article 3(1) of Directive 69/335, the text of which is reproduced in paragraph 4 of this judgment, lays down, in a mandatory and uniform manner for all Member States, the companies to be regarded as capital companies for the purposes of Directive 69/335.

22 In addition, Article 4(1) of that directive determines which transactions are to be subject to capital duty.

23 With regard to the transfer of the effective centre of management, Article 4(1)(g) of Directive 69/335 states that 'the transfer from a Member State to another Member State of the effective centre of management of a company, firm, association or legal person which is considered in the latter Member State, for the purposes of charging capital duty, as a capital company, but is not so considered in the other Member State' is in particular subject to capital duty.

24 On the other hand, under Article 4(3)(b) of that directive, 'the transfer from a Member State to another Member State of the effective centre of management or of

the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company' does not amount to formation of a capital company within the meaning of Article 4(1)(a).

25 It follows that it will be possible for a transaction of that kind to be subject to capital duty in the Member State of destination only if the company concerned is not considered in the Member State of origin, for the purposes of charging that duty, to be a capital company.

26 The Member States which have submitted observations to the Court argue that, where capital duty was not levied on a company in the Member State of origin because the State had abolished that tax, that company is not regarded in that State, for the purposes of charging capital duty, as a capital company, thus fulfilling the conditions laid down by Article 4(1)(g) of Directive 69/335.

27 Such an analysis cannot however be followed, lest the national law classification as a capital company be favoured as opposed to that which derives from Directive 69/335.

28 As set out in paragraph 21 of the present judgment, Article 3(1) of Directive 69/335 specifies, in a mandatory and uniform manner for all Member States, the companies to be treated as capital companies for the purposes of the Directive.

29 A company taking one of the legal forms provided for in Article 3(1) of Directive 69/335 must, therefore, be treated as a capital company within the meaning of the Directive, and thus cannot be liable to capital duty if its effective centre of management is transferred from one Member State to another, on the ground that it would not be considered to be a capital company in the Member State of origin.

30 It should be added that such a divergence in classification, which gives rise to the application of Article 4(1)(g) of Directive 69/335, is on the other hand possible in relation to companies referred to in Article 3(2) of that directive.

31 Although it provides that, '[f]or the purposes of the application of [Directive 69/335], any other company, firm, association or legal person operating for profit shall be deemed to be a capital company', Article 3(2) nevertheless allows Member States not to consider companies, firms, associations or legal persons which have been so deemed to be capital companies for the purpose of charging capital duty.

32 The discretion thus afforded to Member States, which does not exist in respect of the companies referred to in Article 3(1), may therefore result in one particular entity being classified as a capital company in one Member State but not in another. Where there is such a divergence in classification, the transfer of the effective centre of management of the entity concerned would fall within the scope of Article 4(1)(g) of Directive 69/335.

33 In addition, the Court has already held that to favour the criterion of being subject to duty in the Member State of origin as opposed to the criterion of classification as a capital company provided for in Article 4(1)(g) of Directive 69/335 is contrary to the requirements of the directive inasmuch as it would allow capital duty to be

charged where the Directive does not so envisage (see, to that effect, Case C-178/05 *Commission* v *Greece* [2007] ECR I-4185, paragraphs 26 to 30).

34 Furthermore, it is clear from the Court's case-law that although the Member States are free, under Article 7(2) of Directive 69/335, to exempt contributions to companies from capital duty, such an exemption cannot lead to the consequence that another Member State is entitled to tax those contributions (see, to that effect, Case C-494/03 *Senior Engineering Investments* [2006] ECR I-525, paragraph 43).

35 Therefore, the fact that a Member State has exercised the option provided for in Article 7(2) of Directive 69/335 by abolishing capital duty does not mean that, if the effective centre of management of a capital company is transferred from that Member State to another Member State, the latter State may automatically make that transaction subject to capital duty.

36 It follows from all the foregoing that Article 4(1)(g) and (3)(b) of Directive 69/335 must be interpreted to the effect that the waiver by a Member State of the charging of capital duty does not preclude a company falling within one of the categories referred to in Article 3(1)(a) of that directive from being classified as a capital company for the purposes of charging capital duty within the meaning of Article 4(1)(g) of that directive if its effective centre of management is transferred from that Member State to another Member State in which that duty is still levied.

37 In the light of that interpretation, it should be added that the question of possible tax avoidance which would result from the misuse of the provisions of Directive 69/335 interpreted in that manner was raised in the proceedings before the Court.

38 In that regard, even though, formally, the national court has limited its questions to the interpretation of Article 4(1)(g) and (3)(b), and of Article 7(2), of Directive 69/335, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16; and C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64).

39 It must therefore be examined whether the interpretation of Article 4(1)(g) and (3)(b) of Directive 69/335 given in paragraph 36 of the present judgment can contribute to misuse of Community law with the aim of circumventing the provisions of national legislation such as those at issue in the main proceedings.

40 It should first of all be pointed out that Directive 69/335 does not contain any rule specifically designed to prevent the risk of tax avoidance.

41 However, the Court has held that the application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 69).

42 The protection afforded by Community law does not therefore apply to situations in which a natural or legal person intends to rely abusively or fraudulently on Community provisions with the sole aim of putting itself out of reach of the legislation of a Member State.

43 It is true that the fact that a company has been created in a particular Member State in order to benefit from more favourable legislation is not, of itself, sufficient to support the finding that a misuse of Community legislation has occurred.

44 Nevertheless, the formation of a company in a Member State under wholly artificial arrangements which do not reflect economic reality, with the aim of avoiding the tax normally payable, goes beyond the protection which Directive 69/335 must afford to the companies to which it applies.

45 It follows that the consequences flowing from the interpretation of Article 4(1)(g) and (3)(b) of Directive 69/335 given in paragraph 36 of the present judgment must not encourage conduct characterised by the putting in place of artificial arrangements with the sole aim of obtaining a fiscal advantage.

46 It is therefore for the national court to verify whether there is objective evidence of action constituting an abusive practice of that kind in the circumstances of the main proceedings.

47 In those circumstances, the answer to the questions referred to the Court for a preliminary ruling is that Article 4(1)(g) and (3)(b) of Directive 69/335 must be interpreted to the effect that the waiver by a Member State of the charging of capital duty does not preclude a company falling within one of the categories referred to in Article 3(1)(a) of that directive from being classified as a capital company for the purposes of charging capital duty within the meaning of Article 4(1)(g) of that directive if its effective centre of management is transferred from that Member State

to another Member State in which that duty is still levied. Nevertheless, the result of such an interpretation cannot be to encourage conduct characterised by the putting in place of artificial arrangements with the sole aim of obtaining a fiscal advantage. It is for the national court to verify whether there is objective evidence of action constituting an abusive practice of that kind in the circumstances of the main proceedings.

Costs

48 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:

Article 4(1)(g) and (3)(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 and by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, must be interpreted to the effect that the waiver by a Member State of the charging of capital duty does not preclude a company falling within one of the categories referred to in Article 3(1)(a) of that directive from being classified as a capital company for the purposes of charging capital

duty within the meaning of Article 4(1)(g) of that directive if its effective centre of management is transferred from that Member State to another Member State in which that duty is still levied. Nevertheless, the result of such an interpretation cannot be to encourage conduct characterised by the putting in place of artificial arrangements with the sole aim of obtaining a fiscal advantage. It is for the national court to verify whether there is objective evidence of action constituting an abusive practice of that kind in the circumstances of the main proceedings.

[Signatures]