JUDGMENT OF THE COURT (Second Chamber)

1 October 2009 *

In Case C-569/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Special Commissioners of Income Tax, London (United Kingdom), made by decision of 19 December 2007, received at the Court on 24 December 2007, in the proceedings

HSBC Holdings plc,

Vidacos Nominees Ltd

v

The Commissioners for Her Majesty's Revenue and Customs,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, K. Schiemann, J. Makarczyk (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: P. Mengozzi,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2009,

after considering the observations submitted on behalf of:

— HSBC Holdings plc, by R. Norton, solicitor, I. Glick QC, and D. Jowell, Barrister,

— the United Kingdom Government, by M. Hall, I. Rao and R. Thomas, 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 18 March 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 10 and 11 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'), and Articles 43 EC, 49 EC or 56 EC or any other provision of European Community law.

2 The reference has been made in the course of proceedings between HSBC Holdings plc ('HSBC') and Vidacos Nominees Ltd, on the one hand, and the Commissioners for Her Majesty's Revenue and Customs, on the other, concerning the levying of a tax known as 'stamp duty reserve tax' ('SDRT') pursuant to section 96 of the Finance Act 1986 ('FA 1986').

Legal context

Community law

3 Under the first and sixth recitals in the preamble to the directive:

'Whereas the objective of the Treaty is to create an economic union whose characteristics are similar to those of a domestic market and whereas one of the essential conditions for achieving this is the promotion of the free movement of capital;

…

Whereas it is inherent in the concept of a common market whose characteristics are those of a domestic market that duty on the raising of capital within the common market by a company or firm should be charged only once and that the level of this duty should be the same in all Member States so as not to interfere with the movement of capital.'

4 Article 4 of the directive sets out the transactions which are subject to capital duty, including, in particular, the formation of a capital company and an increase in the capital thereof by contribution of assets of any kind.

5 Article 10 of the directive prohibits the levying of any taxes apart from capital duty in respect of the transactions referred to in Article 4 thereof.

6 Under Article 11 of the directive:

'Member States shall not subject to any form of taxation whatsoever:

(a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued;

(b) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities.'

7 However, under Article 12(1)(a) of that directive, the Member States may, notwithstanding Articles 10 and 11 thereof, charge 'duties on the transfer of securities, whether charged at a flat rate or not'.

8 Under Article 7(1) of the directive, those States must exempt from capital duty transactions which were, as at 1 July 1984, exempted or taxed at a rate of 0.5% or less. With regard to other transactions on which capital duty may be levied under the directive, they can either be exempted or charged duty at a single rate not exceeding 1%.

National law

9 By virtue of section 87(1) of the FA 1986, all transfers of shares or other chargeable securities for consideration are subject to SDRT at a rate of 0.5% of the amount or value of the consideration for the transfer. SDRT is not payable where the transfer of shares is effected by means of a stock transfer form which is duly stamped in accordance with section 92 of the FA 1986.

10 Section 87(1) of the FA 1986 applies only to agreements to transfer 'chargeable securities'. The concept of 'chargeable securities' is defined by section 99 of that Act and refers to shares issued by companies established in the United Kingdom or shares issued by foreign companies where those shares are registered in a register in the United Kingdom or 'paired' with shares issued by companies established in the United Kingdom, together with certain other rights in and over such shares. Section 86(4) of the FA 1986 states that the charge applies wherever the transaction is carried out and irrespective of the residence of the parties.

11 Section 96(1) and (2) of the FA 1986 provides:

'1. Subject to … sections 97 and 97A below, there shall be a charge to [SDRT] under this section where:

(a) a person (A) whose business is or includes the provision of clearance services for the purchase and sale of chargeable securities has entered into an arrangement to provide such clearance services for another person, and

(b) in pursuance of the arrangement, chargeable securities are transferred or issued to A or to a person whose business is or includes holding chargeable securities as nominee for A.

2. … tax under this section shall be charged at the rate of 1.5% of the following:

(a) in a case where the securities are issued, their price when issued;

(b) in a case where the securities are transferred for consideration in money or money's worth, the amount or value of the consideration;

(c) in any other case, the value of the securities.'

12 The term clearance service is not defined by legislation. According to the Inland Revenue Stamp Taxes manual, that term must be understood as follows:

'14.10 Typically, a clearance service is a system for holding securities and settling transactions in them by book entry. The securities may be held indefinitely within the system, despite changes in beneficial ownership, and are held either by the company operating the clearance system or by its nominee, and are thus traded without the use of transfer documents.

14.11 Clearance services are common in continental European jurisdictions. It is common for shares to be in bearer form and this method provides physical security (the bearer certificates being held in a vault) whilst facilitating trading and settlement.

14.12 There is no SDRT on agreements to transfer securities held within a clearing service.'

13 After the initial charge to tax, section 90(5) of the FA 1986 exempts transfers within the clearance service from the ordinary charge under section 87 of that Act.

14 Section 97A of the FA 1986 provides that the operator of the clearance service may, with the approval of the Inland Revenue (the authorities responsible for direct taxation), elect that stamp duty and SDRT are to be charged pursuant to that section. An election under section 97A of the FA 1986 comes into force on the date notified to the operator of the clearance service by the Inland Revenue in giving approval. During the period for which that election is in force, stamp duty and SDRT are chargeable, in connection with the clearance services to which the election relates (for example, on any transfer or issue under section 96(1) of the FA 1986), as they would have been chargeable apart from section 96 of the FA 1986. Accordingly, where such an election is made and approved, transfers within the clearance service are taxed at the ordinary rate of 0.5% and no charge is imposed on the entry of the relevant shares into the clearance service.

15 Section 97(4) of the FA 1986 exempts from the charge under section 96 of that Act the issue of shares in exchange for other shares that are held within a 'clearance services scheme', where the issuer either has control of the other company or will do so in consequence of the offer under which the exchange is made. The effect of section 97(6) of the FA 1986 is that this applies only if the other shares are themselves chargeable securities.

The dispute in the main proceedings and the question referred

16 It is apparent from the order for reference that on 7 June 2000 HSBC, a company incorporated in the United Kingdom and resident there for tax purposes, made a public

offer to acquire all of the issued shares of Crédit commercial de France ('CCF'), a public company incorporated in France and resident there for tax purposes, the shares of which were listed on the Paris Stock Exchange.

17 While the offer was couched in terms of a purchase for cash of the CCF shares, it also included a share exchange alternative between the two companies at the rate of 13 shares in HSBC for one share in CCF. In order to make that option attractive for CCF shareholders residing in France, HSBC obtained a listing on the Paris Stock Exchange. As a consequence of that listing, HSBC was obliged to have an account opened in its name with the société interprofessionnelle pour la compensation des valeurs mobilières (Sicovam), that is to say, the French settlement system which, at the material time, held a monopoly in the matter for shares traded on the Paris Stock Exchange. HSBC shares could thus be received in exchange for CCF shares in one of three ways, namely:

— through Sicovam, the French settlement system for shares traded on the Paris Stock Exchange;

— through CREST, the United Kingdom settlement system for shares in uncertificated form, and

— by their nominal registration on HSBC's share register in certified form.

18 HSBC agreed to pay any SDRT arising on the issue of shares traded through Sicovam. Otherwise, the offer would have been financially disadvantageous and, therefore, unattractive to many French shareholders.

19 The HSBC shares issued as consideration for the acquisition of CCF securities were 'chargeable securities' within the meaning of section 99(3) of the FA 1986. Where they were issued to a clearance service, namely, in the main proceedings, Vidacos Nominees Ltd, Sicovam's nominee for the United Kingdom, SDRT was payable at the rate of 1.5% of the price or value of those shares, pursuant to section 96(1) and (2) of the FA 1986. With regard to the other two options, however, no stamp duty or SDRT was payable on the issue of the shares. It was only on each subsequent transfer of shares that duty was payable at the rate of 0.5%.

20 It is apparent from the order for reference that the CCF shareholders elected to receive 255 607 131 HSBC shares through Sicovam. Of those shares, approximately 105 million, or 41%, were withdrawn from Sicovam and traded within two weeks on the London Stock Exchange. Subsequent transfers of those shares within CREST were subject to SDRT at the usual rate of 0.5%.

21 Furthermore, HSBC, whose shares remain listed on the Paris Stock Exchange, offers its shareholders the opportunity to receive dividends in the form of scrip dividends instead of cash dividends. However, when the underlying HSBC shares are held in Sicovam, the scrip dividends are issued into Sicovam, since they are, under that system, registered in the name of that company. As those shares have given rise to the payment of SDRT at the rate of 1.5%, the cost of that tax charge is passed on to HSBC's French shareholders who hold their shares through Sicovam, with the result that those shareholders receive 1.5% fewer shares than other shareholders.

22 HSBC submitted a claim for repayment of the SDRT paid at the rate of 1.5% on shares which were issued into Sicovam. On refusal of that claim by the revenue authorities, HSBC appealed to the Special Commissioners.

23 It was in those circumstances that the Special Commissioners decided to refer the following question to the Court for a preliminary ruling:

'Does Article 10 or Article 11 of [the directive] …, or Article 43, Article 49 or Article 56 of the EC Treaty or any other provision of European Community law prohibit the levying by one Member State ("the first Member State") of a duty on the transfer or issue of shares into a clearance service of 1.5% when:

(a) a company ("Company A") established in the first Member State offers to acquire the listed and traded shares in a company ("Company B") established in another Member State ("the second Member State") in return for shares in Company A, to be issued on the stock exchange in the second Member State;

(b) shareholders in Company B have the option to receive the new shares in Company A either:

— in certificated form; or

— in uncertificated form through a settlement system in the first Member State; or

— in uncertificated form through a clearance service in the second Member State;

(c) the law of the first Member State provides, in summary, that:

— in the event of the issue of shares in certificated form (or in uncertificated form in the settlement system for dematerialised shares of the first Member State), duty shall not be charged on the issue of the shares but on each subsequent sale of the shares, which duty is charged at the rate of 0.5% of the consideration for the transfer; but,

— on the transfer or issue of uncertificated shares to the operator of a clearance service, duty shall be charged (where the shares are issued) at the rate of 1.5% of the issue price or (where the shares are transferred for consideration) at the rate of 1.5% of the amount or value of the consideration or, (in any other case) at the rate of 1.5% of the value of the shares and, no subsequent charge is thereafter levied on sales of the shares (or of rights to or over the shares) within the clearance service;

— the operator of a clearance service may, where it receives the approval of the relevant taxation authority, elect that no duty is charged on the transfer or issue

of the shares to its clearance service, but that duty is instead charged on each sale of the shares within the clearance service, at the rate of 0.5% of the consideration. The relevant taxation authority may (and presently does) require, as a condition for its approval of such an election, that the operator of the clearance system seeking to make such an election should make and maintain arrangements (as the taxation authority considers satisfactory) for the collection of the duty within the clearance service and for complying or securing compliance with the regulations in relation to it;

(d) the arrangements in force at the stock exchange in the second Member State require that all shares issued in that jurisdiction must be held in uncertificated form through a single clearance service established in the second Member State, the operator of which has not made the election referred to above?'

The question referred for a preliminary ruling

24 By its question, the referring court asks, in essence, whether Articles 10 and 11 of the directive and Articles 43 EC, 49 EC or 56 EC, or any other provision of Community law, prohibit the levying of a tax, such as that at issue in the main proceedings, on the occasion of the issue of shares into a clearance service.

25 As a preliminary point, it should be noted that the directive provided for complete harmonisation of the cases in which the Member States may levy indirect taxes on the raising of capital (see, to that effect, Case C-178/05 *Commission* v *Greece* [2007] ECR I-4185, paragraph 31).

26 As the Court has already held, where a matter is harmonised at Community level, national measures relating thereto must be assessed in the light of the provisions of that harmonising measure and not of those of the EC Treaty (see, to that effect, Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32 and Case C-257/06 *Roby Profumi* [2008] ECR I-189, paragraph 14).

27 It follows that, in order to answer the question referred for a preliminary ruling, the Court must limit itself to interpreting the directive.

28 From the outset, it should be noted that, as is apparent from the preamble thereto, the directive seeks to promote the free movement of capital, which is considered essential to the creation of an economic union whose characteristics are similar to those of a domestic market. The pursuit of such an objective presupposes, so far as taxation on the raising of capital is concerned, the abolition of indirect taxes in force in the Member States until then and the imposition in place of them of a duty charged only once in the common market and at the same level in all the Member States.

29 The directive provides in particular, in accordance with the last recital in the preamble thereto, that indirect taxes with the same characteristics as the capital duty or the stamp duty on securities whose retention might frustrate the purpose of the measures provided for therein should be abolished. Those indirect taxes, the levying of which is prohibited, are set out in Articles 10 and 11 of the directive.

30 Article 12(1) of the directive establishes an exhaustive list of taxes and duties other than capital duty which, notwithstanding Articles 10 and 11, may be imposed on capital

companies in connection with the transactions referred to in those provisions (see Case 36/86 *Investeringsforeningen Dansk Sparinvest* [1988] ECR 409, paragraph 9). Article 12 of the directive, and in particular Article 12(1)(a) thereof, refers to the 'duties on the transfer of securities, whether charged at a flat rate or not'.

31 In the main proceedings, the chargeable event giving rise to SDRT consists in the implementation of a specific transaction concerning the acquisition of securities newly issued on the occasion of a public offer. In that respect, as stated by the Advocate General in point 23 of his Opinion, the HSBC shares transferred into the clearance service to be exchanged for CCF shares constituted new shares, corresponding to an increase in capital.

32 It should be noted that to permit the levying of tax or duty on the initial acquisition of a newly issued security amounts in reality to taxing the very issue of that security as it forms an integral part of an overall transaction with regard to the raising of capital. The issue of securities is not an end in itself, and has no point until those securities find investors (Case C-415/02 *Commission* v *Belgium* [2004] ECR I-7215, paragraph 32).

33 For Article 11(a) of the directive to have practical effect, therefore, 'issue', for the purposes of that provision, must include the first acquisition of securities immediately consequent upon their issue (*Commission* v *Belgium*, paragraph 33).

34 To interpret the term 'transfer' referred to in Article 12(1)(a) of the directive in a way such as that proposed by the United Kingdom Government and by the Commission of the European Communities, namely that SDRT at the rate of 1.5% is a charge on share transfers in the form of a 'season ticket', would effectively deprive Article 11(a) of the directive of its practical effect and call in question the clear distinction established by

Articles 11(a) and 12(1)(a) of the directive between the concepts of 'issue' and 'transfer'. In fact, such an interpretation would have the consequence that issues could nevertheless be subject to a tax or duty, although they, while necessarily involving an acquisition of newly issued securities, must not, under that provision, be subject to any taxes or duties other than capital duty.

35 Therefore, the initial acquisition of securities immediately consequent upon their issue cannot be considered to constitute a 'transfer' within the meaning of Article 12(1)(a) of the directive, and, accordingly, a tax on that initial acquisition cannot fall within the derogation under that provision.

36 Moreover, a tax such as SDRT cannot be considered, in reality, to apply to future transfers, since, as stated by the Advocate General in point 38 of his Opinion, neither the tax basis of that tax nor the taxable person is determined by reference to such transfers, which are in any event hypothetical.

37 In the light of those considerations, it must be held that, to the extent that a tax such as SDRT is levied on new securities following an increase in capital, such a tax constitutes taxation for the purposes of Article 11(a) of the directive which is prohibited by that provision.

38 Consequently, the answer to the question referred is that Article 11(a) of the directive must be interpreted as meaning that it prohibits the levying of a duty, such as that at issue in the main proceedings, on the issue of shares into a clearance service.

Costs

39 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 (Second Chamber) hereby rules:

Article 11(a) 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 as meaning that it prohibits the levying of a duty, such as that at issue in the main proceedings, on the issue of shares into a clearance service.

[Signatures]