

JUDGMENT OF THE COURT (Sixth Chamber)
26 September 1996 *

In Case C-287/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Østre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

A/S Richard Frederiksen & Co.

and

Skatteministeriet,

on the interpretation of Articles 4(2)(b) and 10 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),

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. F. Mancini and H. Ragnemalm (Rapporteur), Judges,

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: Danish.

after considering the written observations submitted on behalf of:

- A/S Frederiksen & Co., by Peter Dyhr, of the Copenhagen Bar,
- the Skatteministeriet, by Karsten Hagel-Sørensen, of the Copenhagen Bar,
- the Danish Government, by Peter Biering, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- the Belgian Government, by Jan Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, acting as Agent,
- the Greek Government, by Panagiotis Kamarineas, Assistant Legal Adviser in the State Legal Service, and Sofia Chala, a specialist adviser to the Special Community Legal Department of the Ministry of Foreign Affairs, acting as Agents,
- the Italian Government, by Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and Maurizio Fiorilli, Avvocato dello Stato,
- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Alan Moses QC,
- the Commission of the European Communities, by Anders C. Jessen and Héléne Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the parties at the hearing on 21 March 1996,

after hearing the Opinion of the Advocate General at the sitting on 7 May 1996,

gives the following

Judgment

- 1 By order of 6 October 1994, received at the Court on 21 October 1994, the Østre Landsret (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 4(2)(b) and 10 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).
- 2 Those questions were raised in proceedings between the Danish company A/S Frederiksen & Co. and the Skatteministeriet (Danish Ministry for Fiscal Affairs) concerning the levying of income tax on an interest-free loan granted by that company to one of its subsidiaries.
- 3 Article 4 of the directive lists the transactions which are to be subject to capital duty and those which Member States may, if they choose, subject to such duty. In accordance with Article 4(2)(b), the second category includes:

‘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’.
- 4 According to Article 10, ‘Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever’.

- 5 A/S Frederiksen & Co. ('the parent company') acquired all the shares in Sydjysk Sten og Grus A/S ('the subsidiary') and four months later granted it an interest-free loan amounting to DKR 8 519 285.
- 6 It is apparent from the order for reference that, according to Danish case-law, where income is arbitrarily transferred, the tax authorities may alter the tax returns relating to contracts entered into by parties having common interests, such as companies belonging to the same group. A precondition of such alteration is the establishment by the tax authorities that the subject-matter or form of the transaction in question is unusual in relation to normal market practice and the assumption that the unusual terms are the product of common interests.
- 7 Applying that case-law, the tax authorities went on to alter the parent company's tax returns and charged it tax on the basis of income equivalent to interest at the rate of 11% of the average value of the loan for each tax year. The interest saved was therefore entered as income received by the parent company, while the subsidiary was entitled to deduct the interest for tax purposes.
- 8 The Danish tax authorities accordingly considered that the parent company's income should be increased by the sum of DKR 1 518 000 for the 1986/87 tax year, DKR 1 948 061 for the 1987/88 tax year and DKR 898 621 for the 1988/89 tax year.
- 9 The parent company challenged that decision before the Landskatteret (Regional Tax Tribunal), Copenhagen, which upheld it.
- 10 On appeal, the Østre Landsret decided to stay proceedings pending a preliminary ruling from the Court of Justice on the following two questions:
- '1. Should Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital be interpreted as covering the current value of an interest-free loan?

2. Should Article 10 of the directive be interpreted as precluding income tax from being levied on a parent company in respect of interest fixed after the event on an interest-free loan to a subsidiary, where the amount of the saving on interest is regarded as a contribution of capital to the subsidiary within the meaning of the directive?

Question 1

- 11 By this question, the national court asks in essence whether, where a company benefits from an interest-free loan, Article 4(2)(b) of the directive is applicable to the amount of interest saved.
- 12 The granting of an interest-free loan allows the company to have capital available without having to bear its cost. The resultant saving in interest leads to an increase in its assets by allowing the company to avoid expenditure which it would otherwise have to bear (Case C-249/89 *Trave Schiffahrts-Gesellschaft* [1991] ECR I-257, paragraph 12).
- 13 Furthermore, the granting of an interest-free loan helps to strengthen the company's economic potential in so far as it enables the company to have capital available without having to bear its cost. It must therefore be regarded as likely to increase the value of the company's shares (Case C-249/89 *Trave Schiffahrts-Gesellschaft*, cited above, paragraph 14).
- 14 Consequently, the answer to the first question referred must be that Article 4(2)(b) of the directive is to be interpreted as applying, where a company benefits from an interest-free loan, to the amount of interest saved.

Question 2

- 15 By this question, the national court seeks to ascertain whether Article 10 of the directive precludes the levying of income tax on a parent company which has granted an interest-free loan to one of its subsidiaries, on the basis of interest fixed after the event.
- 16 It is clear from Article 10 that the directive is intended to harmonize the taxes, charges and dues imposed on the raising of capital, within the confines of its field of application, by prohibiting the charging of any tax other than capital duty. Consequently, the question whether the levying of tax on company income falls within the scope of the directive must be considered.
- 17 According to its title, the directive concerns 'indirect taxes on the raising of capital'.
- 18 Moreover, the second recital in the preamble to the directive states that 'the indirect taxes on the raising of capital, in force in the Member States at the present time (...) give rise to discrimination, double taxation and disparities which interfere with the free movement of capital and which, consequently, must be eliminated by harmonization'.
- 19 Finally, according to the last recital in the preamble to the directive, 'the retention of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this directive and those taxes should therefore be abolished'.
- 20 It is clear from those factors that the directive is intended to abolish indirect taxes other than capital duty which possess the same characteristics as capital duty itself. That restriction of the scope of the directive to indirect taxes is also apparent in the various language versions, except for the Danish version which is not so plain on this point.
- 21 Accordingly the harmonization provided for by the directive does not extend to direct taxes, such as company income tax, which are a matter for the Member States themselves.

- 22 In those circumstances, the answer to the second question must be that Article 10 of the directive does not preclude the levying of income tax on a parent company which has granted an interest-free loan to one of its subsidiaries, on the basis of interest fixed after the event.

Costs

- 23 The costs incurred by the Danish, Belgian, Greek, Italian and the United Kingdom Governments and the Commission of the European Communities, 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 proceedings 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 questions referred to it by the Østre Landsret, by order of 6 October 1994, hereby rules:

1. Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as applying, where a company benefits from an interest-free loan, to the amount of interest saved.
2. Article 10 of Directive 69/335/EEC does not preclude the levying of income tax on a parent company which has granted an interest-free loan to one of its subsidiaries, on the basis of interest fixed after the event.

Kakouris

Mancini

Ragnemalm

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass

C. N. Kakouris

Registrar

President of the Sixth Chamber