JUDGMENT OF THE COURT (First Chamber)

19 December 2012 (*)

(Taxation – Directive 90/434/EEC – Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States – Articles 2, 4 and 9 – Transfer of assets – Taxation of the capital gains obtained by the transferring company at the time of the transfer of assets – Deferral of taxation – Requirement that a reserve fund for the suspended tax corresponding to the value of the capital gains obtained be carried over in the balance sheet of the transferring company)

In Case C-207/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Commissione tributaria regionale di Milano (Italy), made by decision of 7 April 2011, received at the Court on 2 May 2011, in the proceedings

**3D I Srl**

v

**Agenzia delle Entrate – Ufficio di Cremona,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič (Rapporteur), E. Levits, J.-J. Kasel and M. Safjan, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2012,

after considering the observations submitted on behalf of:

– 3D I Srl, by A. Fantozzi, R. Esposito and G. Mameli, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

– the European Commission, by P. Rossi and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2012,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 4 and 8(1) and (2)

of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).

2 The reference has been made in proceedings between 3D I Srl ('3D I'), formerly 3D FIN Srl, and the Agenzia delle Entrate – Ufficio di Cremona (Revenue authority – Cremona Office) ('the Agenzia delle Entrate'), concerning the latter's refusal to refund the substitute tax ('imposta sostitutiva') paid by that company following an intra-Community transfer of one of its branches of activity.

## Legal context

*European Union legislation*

3 The first to sixth recitals in the preamble to Directive 90/434 state:

'… mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States … ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; … to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

… tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State; … it is necessary to remove such disadvantages;

… it is not possible to attain this objective by an extension at the Community level of the systems presently in force in the Member States, since differences between these systems tend to produce distortions; … only a common tax system is able to provide a satisfactory solution in this respect;

… the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company;

… in respect of mergers, divisions or transfers of assets, such operations normally result either in the transformation of the transferring company into a permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company;

… the system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the State of the transferring company at the date of their disposal'.

4 Article 2 of that directive, which is included under Title I thereof, entitled 'General provisions', provides:

'For the purposes of this Directive:

…

(c) "transfer of assets" shall mean an operation whereby a company transfers, without being

dissolved, all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;

(d) “exchange of shares” shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;

(e) “transferring company” shall mean the company … transferring all or one or more branches of its activity;

(f) “receiving company” shall mean the company receiving … all or one or more branches of the activity of the transferring company;

…’

5 Title II of Directive 90/434 contains, in Articles 4 to 8 thereof, the ‘Rules applicable to mergers, divisions and exchanges of shares’. Article 4 of that directive provides:

‘1. A merger or division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. The following expressions shall have the meanings assigned to them:

– value for tax purposes: the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger or division but independently of it,

– transferred assets and liabilities: those assets and liabilities of the transferring company which, in consequence of the merger or division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.

2. The Member States shall make the application of paragraph 1 conditional upon the receiving company’s computing any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger or division had not taken place.

3. Where, under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred computed on a basis different from that set out in paragraph 2, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.’

6 Under Article 8(1) and (2) of that directive:

‘1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

2. The Member States shall make the application of paragraph 1 conditional upon the

shareholder's not attributing to the securities received a value for tax purposes higher than the securities exchanged had immediately before the merger, division or exchange.

The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.

In this paragraph the expression "value for tax purposes" means the amount on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.'

7 Title III of Directive 90/434 contains the 'Rules applicable to transfers of assets'. Under Article 9 of that directive, which is the only article in Title III, the provisions of Articles 4 to 6 of that directive are to apply to such transfers.

*Italian legislation*

8 In Italy, Directive 90/434 was transposed into national law by Legislative Decree No 544 of 30 December 1992 on measures for the implementation of the Community Directives relating to the system of taxation for mergers, divisions, transfers of assets and exchanges of shares (GURI No 9 of 13 January 1993, p. 8) ('Legislative Decree No 544/1992').

9 Article 1 of Legislative Decree No 544/1992 stated:

'The provisions of this decree shall apply to:

…

(c) transfers of activities, or of groups of activities relating to a single branch of activity, by one to another of the entities referred to in subparagraph (a) [namely, companies wholly or partially limited by shares, limited liability companies or cooperatives, public and private undertakings, which are established in Italy with wholly or principally commercial objectives, and any other similar entity established in another Member State of the European Union], established in various Member States of the European Union, provided that one of the two is established in Italy.'

10 Article 2(2) of Legislative Decree No 544/1992 provided:

'None of the transfers referred to in point (c) shall constitute the realisation of capital gains or losses: however, the last value attributed for tax purposes to the activity, or branch of activity, transferred shall constitute the value attributed for tax purposes to the share capital received. The difference between the value of the shares or holdings received and the last value, as attributed for the purposes of taxing income, of the assets transferred shall form no part of the taxable income of the contributing undertaking or company so long as it has not been realised or distributed to shareholders. If the shares received are entered in the balance sheet at a value higher than the book value of the transferred activity, the difference must be entered under an appropriate heading and shall form part of the taxable income in the case of distribution. …'

11 In addition, Legislative Decree No 358 of 8 October 1997 on measures concerning the reorganisation of income taxes applicable to disposals and transfers of companies, mergers, divisions and exchanges of shares (GURI No 249 of 24 October 1997, p. 4) ('Legislative Decree No 358/1997') was in force at the time of the transfer at issue in the main proceedings.

12 Under Article 1(1) and (2) of Legislative Decree No 358/1997:

‘1. In the case of capital gains accruing from the transfer of businesses owned for a period of no less than three years and determined in accordance with the criteria laid down in Article 54 of the Consolidated Version of the Law on the Taxation of Revenue, … a tax may be applied, by way of a substitute for the taxes on revenue, at a rate of 19% …

2. For application of the substitution tax, the intention of exercising that option must be indicated in the revenue declaration for the tax period during which the capital gains have been realised …’

13 Under Article 4(1) and (2) of Legislative Decree No 358/1997:

‘1. Transfers of activities owned for a period of no less than three years carried out by the entities referred to in Article 87(1)(a) and (b) of the Consolidated Version of the Law on the Taxation of Revenue … do not constitute a realisation of capital gains or losses. However, the transferring company must accept the last value attributed for tax purposes to the activity transferred as being the value of the shares received and the receiving company shall assume the role of the transferring company as regards the assets and liabilities of that activity; to that effect, it shall state, in an appropriate summary table to be annexed to the revenue declaration, the data set out in the balance sheet and the values attributed for tax purposes.

2. In lieu of the application of paragraph 1, the entities specified therein may, in the act of transfer, opt for application of the Consolidated Version of the Law on the Taxation of Revenue … and of Article 1 of the present Decree. That option may be exercised also in respect of the transfers referred to in Article 1 of [Legislative Decree No 544/1992].’

14 Legislative Decrees No 544/1992 and No 358/1997 were replaced with effect from 1 January 2004 at the time of a reform of the Italian tax system. Under that reform, the regime of fiscal neutrality of cross-border transfers of assets became identical to the regime prescribed for national transfers and the requirement for the business to have been owned for a period of more than three years, as prescribed by Article 4(1) of Legislative Decree No 358/1997, was abandoned. Accordingly, the option of applying the substitute tax at a rate of 19% was removed.

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

15 3D I is a capital company with its corporate seat in Crema (Italy). On 12 October 2000, it transferred a branch of its business that was also located in Italy to a company established in the Grand Duchy of Luxembourg. Following that transaction, the branch that had been transferred became a permanent establishment, in Italy, of that Luxembourg company. In return, 3D I received shares in that Luxembourg company. Those shares were recorded on 3D I’s balance sheet at a higher value than the value for tax purposes of the branch that had been transferred.

16 On 9 May 2001, 3D I elected to pay substitution tax at a rate of 19% in respect of that transaction, as provided for by Articles 1(1) and 4(2) of Legislative Decree No 358/1997, thereby foregoing the regime of fiscal neutrality provided for in Article 2(2) of Decree No 544/1992. Accordingly, 3D I paid LIT 5 732 298 000, that is, EUR 2 960 484.85, corresponding to the amount of substitution tax payable. After the payment of that tax, the capital gains listed in the accounts following the transfer were distributed, since the difference between the value for tax purposes of the branch of activity that had been transferred and the value that had been attributed to the shares received as payment for the transfer had also been recognised for tax purposes (the book values of those shares were realigned with their values for tax purposes).

17 Upon becoming aware, in particular, of the judgment of 21 November 2002 in Case C-436/00 *X and Y* [2002] ECR I-10829, on 8 January 2004 3D I asked the Italian tax authorities to refund the substitution tax which it had paid. It argued that Article 2(2) of Legislative Decree No 544/1992 was incompatible with Directive 90/434 in that it made the neutrality of the transfer subject to conditions not contemplated by that directive. In particular, the existence of the condition pursuant to which the difference in value had to be frozen in a non-distributable reserve fund had in practice, according to 3D I, led the undertakings concerned to opt for the substitution tax, since the third option envisaged by the national system, namely payment of standard tax at a rate of 33% on the difference in value, was even less advantageous than the other two options. 3D I claimed that it had mistakenly believed that the conditions set out in Article 2(2) of Legislative Decree No 544/1992 were lawful and that, because of that mistake, it had opted for the substitution tax rather than for the regime of fiscal neutrality.

18 After that request for reimbursement had been implicitly rejected by the Agenzia delle Entrate, on 13 April 2004 3D I brought an action before the Commissione tributaria provinciale di Cremona (Provincial Tax Court, Cremona). In that court's ruling of 11 October 2006, the action was rejected on the ground, inter alia, that 3D I had freely chosen the regime of substitution tax and that it had obtained the benefit of having the difference in value taxed at a rate that was highly favourable in comparison with that at which 3D I would normally have had to pay tax in the event of realisation of the capital gain.

19 On 5 March 2007, 3D I appealed against that ruling to the Commissione tributaria regionale di Milano (Regional Tax Court, Milan). That court takes the view that Article 2(2) of Legislative Decree No 544/1992 – in so far as it imposes an obligation to carry over in the transferring company's balance sheet a reserve fund for suspension of tax following an intra-Community transfer, on pain of incurring taxation of any capital gain arising from the transfer – is contrary to Directive 90/434 and to the settled case-law of the Court, which has declared that measures which impede the free circulation of capital and the freedom of establishment are unlawful. In order to avoid such incompatibility with European Union law, the Commissione tributaria takes the view that the Member States should delay the taxation of capital gains until the point in time at which the capital gains are actually realised, without making that deferral of taxation subject to conditions that excessively limit those fundamental freedoms.

20 In those circumstances, the referring court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where the legislation of a Member State – such as the Italian legislation laid down in Article 2(2) of Legislative Decree [No 544/1992] – provides that, in consequence of a transfer or exchange of shares, the transferring company is to be taxed on the capital gains arising from the transfer and the capital gain is to be deemed to correspond to the difference between the initial cost of acquiring the shares or holdings transferred and their current market value, unless the transferring company carries over in its own balance sheet a special reserve fund equivalent to the capital gains arising upon the transfer, is that legislation, in the circumstances of the case covered by the present proceedings, incompatible with Articles 2, 4 and 8(1) and (2) of [Directive 90/434]?'

**Consideration of the question referred**

21 By its question, the referring court asks, in essence, whether Articles 2, 4 and 8(1) and (2) of Directive 90/434 are to be interpreted as precluding, in a situation such as the one at issue in the main proceedings, a transfer of assets or an exchange of shares from giving rise to the taxation of the transferring company on the capital gain arising from that transfer, unless the transferring

company carries over in its own balance sheet an appropriate reserve fund equivalent to the capital gain arising upon that transfer.

22 However, it is common ground that the case in the main proceedings concerns exclusively a transfer of assets as defined in Article 2(c) of that directive, and not an exchange of shares as defined in Article 2(d) thereof. In those circumstances, that question must be restricted to the situation involving a transfer of assets.

23 Moreover, concerning that particular situation, it should be stated that it follows from Article 9 of Directive 90/434 that Article 8 of that directive does not feature among the provisions which have been declared applicable to transfers of assets. Article 8 provides that, on a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company may not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder. The inapplicability of that article to transfers of assets is attributable to the fact that, in the event of such transfers, the securities representing the capital of the receiving company are not issued to the transferring company's shareholders but to the transferring company itself.

24 Accordingly, the question referred must be analysed in the light of Articles 2, 4 and 9 of Directive 90/434.

25 With regard, in particular, to Article 4(1) of that directive, that provision, read in conjunction with Article 9 thereof, provides that a transfer of assets is not to give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. That provision states that the value for tax purposes is the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the transfer of assets but independently thereof. Transferred assets and liabilities, for the purposes of a transfer of assets, are to be taken to mean the branches of activity of the transferring company which, in consequence of the transfer, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company, or which become that establishment, and play a part in generating the profits or losses taken into account for tax purposes.

26 By imposing that fiscal neutrality requirement with regard to the receiving company and the acquired company, Directive 90/434 seeks – as stated in the first and fourth recitals in its preamble – to ensure that a transfer of assets concerning companies from different Member States is not hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States, in order to allow undertakings to adapt themselves to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level (see, to that effect, Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 45; Case C-285/07 *A.T.* [2008] ECR I-9329, paragraph 21; and Case C-352/08 *Modehuis A. Zwijnenburg* [2010] ECR I-4303, paragraph 38).

27 However, that fiscal neutrality requirement is not unconditional. Under Article 4(2) of Directive 90/434, read in conjunction with Article 9 thereof, the Member States are required to make the application of Article 4(1) conditional upon the receiving company's computing any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company if the transfer of assets had not taken place. Article 4(3) of that directive states that where, under the laws of the Member State of the transferring company, the receiving company is entitled to have that depreciation or those gains or

losses computed on a basis different from that set out in Article 4(2), Article 4(1) is not to apply to the assets and liabilities in respect of which that option is exercised.

28 As noted by the European Commission, that obligation for the receiving company, if it wishes to benefit from fiscal neutrality, to maintain the continuity of the valuation of the assets and liabilities transferred in order to calculate any new depreciation and any gains or losses in respect of those assets and liabilities, is intended to prevent that neutrality from leading to a permanent exemption which is, however, not provided for in Directive 90/434. It follows from the fourth and sixth recitals in the preamble thereto that that directive establishes only a system of deferral of the taxation of the capital gains relating to the assets transferred, which, while avoiding taxation arising from the business transfer itself, safeguards the financial interests of the State of the transferring company while ensuring taxation of those capital gains at the date of their actual disposal (see, to that effect, Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 32; *A.T.*, paragraph 28; and *Modehuis A. Zwijnenburg*, paragraph 39).

29 While Directive 90/434 thus sets out the conditions governing the deferral, for the receiving company, of taxation of the capital gains relating to the business transferred, it does not, by contrast, establish the conditions which govern the transferring company's ability to benefit from deferral of taxation of the capital gains relating to the securities representing the capital of the receiving company and issued in exchange for the transfer of assets. In particular, it does not address the question as to what value the transferring company must attribute to those securities.

30 Contrary to the view apparently taken by 3D I, it follows from the foregoing, not that Directive 90/434 prohibits the Member States from setting such conditions, but that that directive, as the Advocate General has noted in points 42 and 49 of his Opinion, leaves it to the Member States' discretion as to whether or not the fiscal neutrality from which the transferring company benefits is to be made subject to obligations to valuate the securities received in exchange, such as maintaining the continuity of values for tax purposes, provided that those obligations do not have the consequence that the issue of those securities during the transfer of assets itself gives rise to taxation of the capital gains relating to those assets.

31 As the Advocate General has noted in point 43 of his Opinion, that finding is confirmed by the history of Directive 90/434 as well as by the fact that, in its most recent proposal of 17 October 2003 for a Council directive amending Directive 90/434 (COM(2003) 613 final), as in its proposal for a Council directive on the common system of taxation applicable to mergers, divisions and transfers of assets involving companies of different Member States (JO 1969 C 39, p. 1), the Commission proposed to include a provision concerning the value to be attributed to the securities received in exchange for the business transfer. By that provision, pursuant to which the real value that the business transferred had immediately prior to the transfer would be attributed to those securities, the Commission sought to avoid the double taxation which could arise at the time of the disposal of the capital gains, in situations where the receiving company had determined the value of the business transferred in accordance with the condition set out in Article 4(2) of Directive 90/434 and where the transferring company had attributed the value which the business transferred had immediately before the operation to the securities received. However, the legislature of the European Union did not adopt that proposal.

32 As regards the situation at issue in the main proceedings, it is clear from the order for reference – and has been pointed out by both the Italian Government and the Commission – that the national legislation would have allowed 3D I to attribute the value which the business transferred had before that operation to the securities received in exchange for that transfer of assets and would thus have allowed it to benefit from the deferral of taxation of the capital gains relating to those securities, subject to a single condition which – as has been stated in the preceding paragraphs of the present

judgment – is compatible with current European Union law.

33 Under those circumstances, the fact that the national legislation offers the transferring company the additional option of attributing a higher value to those securities than the value of the business transferred before that operation, corresponding, in particular, to the value of the capital gain arising upon that transfer, but makes the exercise of that option conditional upon that company carrying over in its own balance sheet a special reserve fund equivalent to the capital gains thus arising, cannot be considered incompatible with Directive 90/434.

34 In addition, the Italian Government and the Commission have stated that the condition at issue in the main proceedings is a simple function of the accounting imperatives that necessarily follow from the share valuation and that the taxation of that reserve fund in the event of a distribution to the transferring company's shareholders was necessary under the national tax system in force at the time of the events at issue in the main proceedings in so far as that system, which granted those shareholders a tax credit upon that distribution, would have caused direct damage to the Italian Treasury and would have given those shareholders – and, indirectly, the transferring company – an undue advantage.

35 In the light of the foregoing, the answer to the question referred is that Articles 2, 4 and 9 of Directive 90/434 must be interpreted as not precluding, in a situation such as the one at issue in the main proceedings, the consequence of a transfer of assets being the taxation of the transferring company on the capital gain arising from that transfer, unless the transferring company carries over in its own balance sheet an appropriate reserve fund equivalent to the capital gain arising upon that transfer.

**Costs**

36 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 (First Chamber) hereby rules:

**Articles 2, 4 and 9 of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States must be interpreted as not precluding, in a situation such as the one at issue in the main proceedings, the consequence of a transfer of assets being the taxation of the transferring company on the capital gain arising from that transfer, unless the transferring company carries over in its own balance sheet an appropriate reserve fund equivalent to the capital gain arising upon that transfer.**

[Signatures]

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** Language of the case: Italian.