Case C-285/07

A.T.

v

Finanzamt Stuttgart-Körperschaften

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Directive 90/434/EEC – Cross-border exchange of shares – Fiscal neutrality – Conditions – Articles 43 EC and 56 EC – Legislation of a Member State making the continued use of the book value of the shares transferred in exchange for the new shares received, and therefore the fiscal neutrality of the transfer, conditional on the carryover of that value in the tax balance sheet of the acquiring foreign company – Compatibility)

Summary of the Judgment

Approximation of laws – Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States – Directive 90/434

(Council Directive 90/434, Art. 8(1) and (2))

Article 8(1) and (2) of Directive 90/434 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States precludes legislation of a Member State under which, in consequence of an exchange of shares, the shareholders of the acquired company are taxed on the capital gains arising from the transfer and the capital gain is deemed to correspond to the difference between the initial cost of acquiring the shares transferred and their market value, unless the acquiring company carries over the historical book value of the shares transferred in its own tax balance sheet.

The mandatory and clear wording of Article 8(1) and (2) of Directive 90/434 offers no indication whatsoever that the Community legislature intended to leave Member States discretion with regard to implementation which would permit them to make the fiscal neutrality provided for in favour of the shareholders of the acquired company subject to conditions going beyond those provided for in paragraph 2 of that article. To leave the Member States such discretion would be contrary to the very objective of the directive which is to set up a common tax system instead of extending to the Community level the systems currently in force in the Member States, since differences between those systems tend to produce distortions.

Furthermore, such tax legislation, which aims to prevent taxation of an exchange of shares operation – even at a stage later than that exchange – from being circumvented once and for all and which refuses in a general way to grant the tax advantages provided for under Directive 90/434 in respect of the exchange of shares operations covered by that directive solely on the ground that the acquiring company has not, in its fiscal balance sheet, valued the shares transferred at their historical book value, cannot be based on Article 11(1)(a) of Directive 90/434 and, on that basis, considered to be compatible with it. The Member States must grant the tax advantages provided for under Directive 90/434 in respect of the exchanges of shares referred to in Article 2(d) thereof, unless those operations have as their principal objective or as one of their principal objectives tax evasion or tax avoidance within the meaning of Article 11(1)(a) of the directive. It is, however, only by way of exception and in specific cases that Member States may, pursuant to that article, refuse to apply or withdraw the benefit of all or any part of the provisions of the directive. Therefore, in order to determine whether the planned operation has such an objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must carry out a general examination of each particular case.

In that regard, although such tax legislation also aims to make taxation possible in cases in which it becomes apparent that there is a gap in the system of taxation, a Member State may not be authorised unilaterally to fill such gaps, supposing they exist, as that would risk undermining the achievement of the objective of Directive 90/434, which is to set up a common tax system. Thus, the fact that the applicable law requires the shareholder of the acquired company subsequently to dispose of the shares received in exchange and that the stock exchange price of the shares of the receiving company has fallen significantly, do not justify treating the exchange of shares alone as a chargeable event for tax purposes, since at the time of the exchange the hidden reserves remained as yet unrealised.

(see paras 26-27, 30-32, 34, 36, 39, operative part)

JUDGMENT OF THE COURT (First Chamber)

11 December 2008 (*)

(Directive 90/434/EEC – Cross-border exchange of shares – Fiscal neutrality – Conditions – Articles 43 EC and 56 EC – Legislation of a Member State making the continued use of the book value of the shares transferred in exchange for the new shares received, and therefore the fiscal neutrality of the transfer, conditional on the carryover of that value in the tax balance sheet of the acquiring foreign company – Compatibility)

In Case C?285/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 7 March 2007, received at the Court on 14 June 2007, in the proceedings

A.T.

v

Finanzamt Stuttgart-Körperschaften,

intervening party:

Bundesministerium der Finanzen,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, A. Tizzano, A. Borg Barthet, E. Levits and J.J. Kasel, Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 17 April 2008,

after considering the observations submitted on behalf of:

– A.T., by M. Schaden and H. Winkler, Rechtsanwälte, and by W. Schön, Professor,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 November 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 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) and of Articles 43 EC and 56 EC.

2 The reference was made in proceedings between A.T. and the Finanzamt Stuttgart-Körperschaften (tax authority in Stuttgart, responsible for companies; 'the Finanzamt') regarding the latter's decision to tax a capital gain arising from a transfer in the context of a cross-border exchange of shares.

Legal framework

Community legislation

3 Directive 90/434 aims, according to the first recital in its preamble, to ensure that the company restructuring operations of different Member States, such as mergers, divisions, transfers of assets and exchanges of shares, are not hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States.

4 For that purpose, the directive lays down a body of rules according to which those operations may not, as such, give rise to tax. Possible capital gains associated with those operations can, in principle, be taxed, but not until the time of actual disposal.

5 The first four recitals and the ninth recital in the preamble to Directive 90/434 are worded as follows:

'Whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas 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;

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

Whereas 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; whereas only a common tax system is able to provide a satisfactory solution in this respect;

Whereas 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;

…

Whereas it is necessary to allow Member States the possibility of refusing to apply this Directive where the merger, division, transfer of assets or exchange of shares operation has as its objective tax evasion or avoidance ….'

6 Point (d) of Article 2 of Directive 90/434 defines an 'exchange of shares' as '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'.

7 Under points (g) and (h) of Article 2 of the directive, 'acquired company' means 'the company in which a holding is acquired by another company by means of an exchange of securities', and 'acquiring company' means 'the company which acquires a holding by means of an exchange of securities'.

8 Article 8(1) and (2) of Directive 90/434, which appears in Title II of the directive concerning the rules applicable to mergers, divisions and exchanges of shares, provides:

'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.'

9 Article 11(1)(a) of Directive 90/434 provides inter alia that a Member State may refuse to

apply or withdraw the benefit of all or any part of the provisions of Title II of the directive where it appears that the exchange of shares operation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance.

German legislation

10 Paragraph 23(4) of the Law on taxation of business reorganisations (Umwandlungssteuergesetz) of 28 October 1994 (BGBl. 1994 I, p. 3267; 'the UmwStG'), as amended, governs the transfer of shares held in a company from a Member State of the European Union, the characteristics of which are defined in Article 3 of Directive 90/434, to another European Union company limited by shares.

11 Under the second sentence of Paragraph 20(1) of the UmwStG, if it can be shown that, following such a transfer, the company to which the transfer was made ('the acquiring company') holds directly – by virtue of its own shareholding, calculated by taking into account the shares transferred – the majority of the voting rights in the company whose shares it has received ('the acquired company'), the shares received by the acquiring company are to be valued in accordance with the first to fourth, and sixth sentences of Paragraph 20(2) of the UmwStG, and the new shares which the acquired company has received from the acquiring company are to be valued in accordance with the first sentence of Paragraph 20(4) of the UmwStG.

12 Under the first sentence of Paragraph 20(2) of the UmwStG, the company may value the business capital transferred at its book value or at a higher value. Under the second sentence of that provision, it is permissible to attribute the book value even if the business capital transferred must, pursuant to rules of commercial law, be attributed a higher value in the trading balance sheet.

13 The first sentence of Paragraph 20(4) of the UmwStG provides that the value attributed by the company to the transferred business capital is to be deemed to represent, for the acquired company, the transfer price and the cost of acquiring the shares of that company. By that provision, the UmwStG imposes a double carryover of the book value, a rule that the acquired company may continue to use the book value of the shares transferred only if the acquiring company itself values the shares transferred at their book value. The UmwStG makes no distinction in that regard between transfers in Germany and those carried out abroad; both are treated in the same way.

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

14 A.T., a German public limited company, included, within its group of companies, C-GmbH, a German private limited company, in which it held 89.5% of the shares.

15 On 28 April 2000, A.T. transferred that holding to a French public limited company, G-SA, in exchange for the allotment of new shares in that company, representing 1.47% of the share capital and resulting from an increase in capital. Those shares, whose stock exchange price subsequently fell significantly, fell to be disposed of within five years owing to the requirements of the law governing the supervision of the financial markets.

16 Since, following their transfer, the shares which had been held in C-GmbH by its parent company, A.T., were not valued in G-SA's trading and tax balance sheets at their book value, as maintained until then in A.T.'s tax balance sheet, but at their market value as specified in the transfer contract, the Finanzamt – relying on the first sentence of Paragraph 23(4) and the first sentence of Paragraph 20(4) of the UmwStG, and on an associated circular of the Bundesministerium der Finanzen (Federal Ministry of Finance) – refused to allow A.T., for the

purposes of its liability to tax for the year 2000, to maintain, in relation to the G?SA shares which it had acquired in exchange, the historical book value of the C-GmbH shares which it had transferred. The Finanzamt therefore took the view that the transfer operation was taxable and imposed a tax on the capital gain corresponding to the difference between the initial cost of acquiring the shares in C-GmbH and their market value.

17 The action brought by A.T. against the tax assessment notices issued under the above provisions was successful at first instance. The Finanzamt thereupon appealed on a point of law to the Bundesfinanzhof. The latter is of the opinion that, applying the UmwStG, A.T.'s action should be dismissed. Under the UmwStG, the shares held in C?GmbH should have been valued at their book value in G?SA's balance sheet, which, moreover, would have been possible under French law.

18 Since it nevertheless has doubts with regard to the compatibility with Community law of the application of the double book value carryover requirement to cross-border transfers, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 8(1) and (2) of Directive [90/434] preclude the taxation rules of a Member State under which, on the transfer of shares in one EU company to another, the [shareholder of the acquired company] may maintain the book value of the shares transferred only if the [acquiring company] has itself valued the shares transferred at their book value ('double book value carryover' – *doppelte Buchwertverknüpfung*)?

2. If the answer is in the negative: are the above rules contrary to Articles 43 EC and 56 EC, even though the 'double book value carryover' is required also on a transfer of shares in a company to one that is subject to unlimited taxation?'

Questions referred for a preliminary ruling

19 By its first question, the referring court asks, essentially, whether Article 8(1) and (2) of Directive 90/434 precludes legislation of a Member State under which, in consequence of an exchange of shares, the shareholders of the acquired company are taxed on the capital gains arising from the transfer and the capital gain is deemed to correspond to the difference between the initial cost of acquiring the shares transferred and their market value, unless the acquiring company carries over the historical book value of the shares transferred in its own tax balance sheet.

20 At the outset, it should be pointed out that, under Article 8(1) of Directive 90/434, on an exchange of shares, the allotment of securities representing the capital of the acquiring company to a shareholder of the acquired company in exchange for securities representing the capital of the latter company is not, of itself, to give rise to any taxation of the income, profits or capital gains of that shareholder.

21 By imposing that fiscal neutrality requirement with regard to the shareholders of the acquired company, Directive 90/434 aims – as stated in the first and fourth recitals in its preamble – to ensure that an exchange of shares 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.

22 However, that fiscal neutrality requirement is not unconditional. Under Article 8(2) of Directive 90/434, the Member States are to make the application of Article 8(1) conditional upon the shareholder's not attributing to the securities received a value for tax purposes higher than the

value attributed to the securities exchanged immediately before the exchange of shares.

23 As it is, as it emerges from the order for reference and, in particular, from the first question referred for a preliminary ruling, under the German legislation at issue in the main proceedings the shareholder of the acquired company may continue to use the book value of the shares transferred for the securities received in exchange only if the acquiring company also values those shares at their historical book value.

24 The German Government argues in that regard that such a requirement – the double book value carryover – is compatible with Directive 90/434, since that directive, by remaining silent as to the valuation of the shares transferred in the balance sheet of the acquiring company, leaves the Member States discretion with regard to the implementation of the relevant provisions.

25 Such an interpretation of Directive 90/434 cannot be accepted.

26 First, it must be held that the mandatory and clear wording of Article 8(1) and (2) of Directive 90/434 offers no indication whatsoever that the Community legislature intended to leave Member States discretion with regard to implementation which would permit them to make the fiscal neutrality provided for in favour of the shareholders of the acquired company subject to additional conditions.

27 Furthermore, to leave the Member States such discretion would be contrary to the very objective of the directive which is, as is already clear from its title and, in particular, from the third recital in its preamble, to set up a common tax system instead of extending to the Community level the systems currently in force in the Member States, since differences between those systems tend to produce distortions.

28 Moreover, to make the fiscal neutrality provided for in Article 8(1) and (2) of Directive 90/434, in relation to the exchange of shares involving companies from different Member States, subject to the additional condition that the acquiring company carry over the historical book value of the shares transferred in its tax balance sheet would be contrary to the purpose of the directive, which is to eliminate fiscal barriers to cross-border restructuring of undertakings, by ensuring that any increases in the value of shares are not taxed until their actual disposal (see, in that regard, Case C?321/05 *Kofoed* [2007] ECR I?5795, paragraph 32).

29 The German Government claims, however, that the German legislation at issue in the main proceedings contributes to the objective of Directive 90/434, which is to grant a deferral of taxation, not a permanent exemption. The requirement of double book value carryover in cases of the cross-border exchange of shares was precisely intended to ensure that taxation – to be imposed on one occasion only – was not circumvented through the transfer of shares abroad, where the disposal of the shares would ultimately not be taxed at all, either with regard to the foreign acquiring company or with regard to the national transferring company.

30 To the extent that the German Government intends thereby to assert that the German legislation at issue in the main proceedings is necessary in order prevent taxation from being circumvented once and for all – even at a stage later than the exchange of shares – it should be recalled that the Court has already held that the Member States must grant the tax advantages provided for under Directive 90/434 in respect of the exchanges of shares referred to in Article 2(d) thereof, unless those operations have as their principal objective or as one of their principal objectives tax evasion or tax avoidance within the meaning of Article 11(1)(a) of the directive (Case C-28/95 *Leur-Bloem* [1997] ECR I?4161, paragraph 40).

31 It is, however, only by way of exception and in specific cases that Member States may,

pursuant to Article 11(1)(a) of Directive 90/434, refuse to apply or withdraw the benefit of all or any part of the provisions of the directive (*Kofoed*, paragraph 37). In order to determine whether the planned operation has such an objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must carry out a general examination of each particular case (*Leur-Bloem*, paragraph 41).

32 It must therefore be held that Article 11(1)(a) of Directive 90/434 cannot provide a basis for tax legislation of a Member State, such as that at issue in the main proceedings, which refuses in a general way to grant the tax advantages provided for under Directive 90/434 in respect of the exchange of shares operations covered by that directive, solely on the ground that the acquiring company has not, in its fiscal balance sheet, valued the shares transferred at their historical book value, and, in consequence, such legislation cannot be regarded as compatible with that directive.

33 In that context, it should also be noted that – without being contradicted on that point by the German Government – A.T. contends in its written observations that the exchange of shares at issue in the main proceedings took place only in order to satisfy American stock exchange requirements and that G-SA still retained the C-GmbH shares which it had acquired.

34 Although the legislation at issue in the main proceedings aims – as the German Government contended at the hearing – not only to prevent abuses, but also to make taxation possible in cases in which it becomes apparent that there is a gap in the system of taxation, it must be held that to permit a Member State unilaterally to fill such gaps, supposing they exist, would risk undermining the achievement of the objective of Directive 90/434 which, as pointed out in paragraph 27 above, is to set up a common tax system.

35 In that regard, it should be pointed out that Directive 90/434 itself aims, in accordance with the fourth recital in its preamble, to safeguard the financial interests of the State of the acquired company. Thus, the second subparagraph of Article 8(2) of Directive 90/434 provides that the application of Article 8(1) is not to 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.

36 However, as the Commission observes, the facts that, in the main proceedings, stock exchange law requires A.T. subsequently to dispose of the shares received in exchange and that the stock exchange price of G-SA shares has fallen significantly, do not justify treating the exchange of shares alone as a chargeable event for tax purposes, since at the time of the exchange the hidden reserves remained as yet unrealised.

37 Moreover, it should be noted that, as the German Government admits, it is not the German tax authorities which would benefit, with a view to the taxation of a subsequent disposal of the shares transferred, from the carryover, to the books of the acquiring company, of the historical book value of those shares, but, at best, the French tax authorities, making it even less apparent why the German legislature should have an interest in imposing such a requirement.

38 It is, moreover, all the more difficult to detect a real interest in the requirement of double book value carryover of the historical book value of the shares transferred because – as pointed out by A.T. and the Commission in their respective written observations and confirmed by the German Government at the hearing – the UmwStG has in the meantime been amended so that since the beginning of 2007 that requirement has no longer applied to exchanges of shares involving companies from different Member States.

39 In the light of all of the foregoing, the answer to the first question must be that Article 8(1) and (2) of Directive 90/434 precludes legislation of a Member State under which, in consequence

of an exchange of shares, the shareholders of the acquired company are taxed on the capital gains arising from the transfer and the capital gain is deemed to correspond to the difference between the initial cost of acquiring the shares transferred and their market value, unless the acquiring company carries over the historical book value of the shares transferred in its own tax balance sheet.

40 In the light of the answer given to the first question referred for a preliminary ruling, it is not necessary to answer the second question.

Costs

41 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:

Article 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 precludes legislation of a Member State under which, in consequence of an exchange of shares, the shareholders of the acquired company are taxed on the capital gains arising from the transfer and the capital gain is deemed to correspond to the difference between the initial cost of acquiring the shares transferred and their market value, unless the acquiring company carries over the historical book value of the shares transferred in its own tax balance sheet.

[Signatures]

* Language of the case: German.