Case C-352/08

Modehuis A. Zwijnenburg BV

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Approximation of laws – 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 – Article 11(1)(a) – Whether applicable to transaction tax)

Summary of the Judgment

1. *Preliminary rulings – Jurisdiction of the Court – Interpretation sought owing to the applicability to an internal situation of a provision of Union law made applicable by national law – Jurisdiction to provide such an interpretation*

(Art. 267 TFEU)

2. *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 – Operations having as their purpose fraud or tax evasion*

(Council Directive 90/434, Art. 11(1)(a))

1. Where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in Union law in order, in particular, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the Union interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

(see para. 33)

2. Article 11(1)(a) 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 is to be interpreted as meaning that the favourable arrangements introduced by that directive may not be withheld from a taxpayer who has sought, by way of a legal stratagem involving a company merger, to avoid the levying of a transaction tax, where that tax does not come within the scope of application of that directive.

It is 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 that directive. Consequently, Article 11(1)(a) of Directive 90/434, as a provision setting out an exception, must be interpreted strictly, regard being had to its wording, purpose and context. By making reference, as regards valid economic reasons, to the restructuring or rationalisation of the activities of the companies participating in the operation in question, in which case there can be no presumption of tax evasion or tax avoidance, that provision is therefore clearly limited to company mergers and other reorganisational operations concerning them and is applicable only to taxes arising from those operations.

In addition, Directive 90/434 does not lead to a comprehensive harmonisation of the taxes that can be charged on a merger or on a similar operation between companies of different Member States. By introducing tax rules neutral from the point of view of competition, that directive confines itself to resolving certain tax disadvantages connected with the cross-border restructuring of undertakings. It follows that only the taxes expressly referred to in Directive 90/434 may benefit from the favourable arrangements introduced by that directive and are, therefore, liable to come within the scope of the exemption provided for in Article 11(1)(a) thereof. There being nothing in that directive to suggest that it intended to extend the benefit of those favourable arrangements to other taxes, such as a tax levied on the acquisition of real property situated in the national territory, that latter tax must be regarded as continuing to fall within the ambit of the fiscal powers of the Member States, and the benefit of the favourable arrangements introduced by Directive 90/434 may not be withheld, under Article 11(1)(a) of that directive, in order to compensate for the non-payment of a tax, the basis and rate of which necessarily differ from those applicable to mergers of companies and other reorganisational operations concerning them.

(see paras 45-47, 49-50, 52-54, 56, operative part)

JUDGMENT OF THE COURT (First Chamber)

20 May 2010 (*)

(Approximation of laws – 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 – Article 11(1)(a) – Whether applicable to transaction tax)

In Case C?352/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 11 July 2008, received at the Court on 31 July 2008, in the proceedings

Modehuis A. Zwijnenburg BV

v

Staatssecretaris van Financiën,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, acting for the President of the First Chamber, E. Levits, A. Borg Barthet, M. Ileši? and J.-J. Kasel (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Modehuis A. Zwijnenburg BV, by A. Bremmer, advocaat,

– the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

– the French Government, by G. de Bergues and J.?C. Gracia, acting as Agents,

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

– the Portuguese Government, by L. Inez Fernandes, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 16 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1)(a) 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 the course of a dispute between Modehuis A. Zwijnenburg BV ('Zwijnenburg') and the Staatssecretaris van Financiën (State Secretary for Finance) concerning a claim, based on an exemption provided for by statute law in the event of company mergers, for reimbursement of transaction tax which has been paid.

Legal context

European Union Legislation

3 According to the first recital in its preamble, Directive 90/434 seeks to ensure that operations involving the restructuring of companies 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 It follows from the fourth recital in the preamble to that directive that 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.

5 Article 4(1) of Directive 90/434 provides that '[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'.

6 According to Article 8(1) of Directive 90/434, '[o]n 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'.

7 Article 11(1)(a) of Directive 90/434 is worded as following:

'1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares:

(a) has as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons, such as the restructuring or rationalisation of the activities of the companies participating in the operation, may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives'.

National legislation

8 Article 14 of the 1969 Law on corporation tax (Wet op de vennootschapsbelasting 1969), in the version applicable to the case in the main proceedings, states:

'1. A taxpayer who transfers all, or a self-standing part, of his business (the transferor) to another body which is already liable to tax or which becomes liable to tax by reason of the transfer (the transferee) in return for the issue of the transferee's shares (company merger) is not to take into account the profits made by the transfer or at the time of the transfer… If the profits are not taken into consideration, the transferee shall be substituted for the transferor with regard to all assets acquired in the context of the company merger.

…

4. By way of derogation from paragraphs 1 and 2, the profits are to be taken into consideration if the company merger is predominantly designed to avoid or defer taxation. Unless the contrary is proved, the company merger shall be deemed to be predominantly designed to avoid or defer taxation if it is not carried out for commercially valid reasons, such as the restructuring or rationalisation of the activities of the transferor and the transferee. If, over the course of the three years following the transfer, the shares of the transferor or the transferee are transferred, in whole or in part, directly or indirectly, to a body which has no connection with the transferor and the transferee, it shall be presumed that there are no commercially valid reasons, unless the contrary is proved.

…

8. The transferor seeking assurance that the company merger will not be deemed to be predominantly designed to avoid or defer the levying of tax may, prior to the transfer, refer a request to the inspector, who shall give his ruling by way of a decision which may be challenged.'

9 Pursuant to Article 2 of the 1970 Law on the taxation of legal transactions (wet op belastingen van rechtsverkeer 1970), in the version applicable to the case in the main proceedings, 'transaction tax' is to be understood as being 'tax levied in the event of acquisition of real property situated in the Netherlands or tax to which that real property is subject'.

10 Article 4 of that law states:

‘“Real property”, within the terms of Article 2, means inter alia (notional real property):

a. shares in entities, the capital of which is divided into shares and the assets of which, at the time of acquisition or at any point during the year immediately preceding that acquisition, consist or consisted mainly of real property situated in the Netherlands, on condition that such real property, taken as a whole, serves or served, wholly or principally, the acquisition, transfer or exploitation of that real property;

…’

11 Article 14 of that law provides that ‘the tax shall amount to 6%’.

12 Article 15(1)(h) of that law reads as follows:

‘1. Subject to conditions to be laid down by public administrative regulation, acquisitions made in the following contexts shall be exempt from transaction tax:

…

h. in the event of merger, division or internal restructuring; …’

13 Article 5a of the Decree implementing the Law on the taxation of legal transactions (Uitvoeringsbesluit wet op belastingen van rechtsverkeer), in the version applicable to the case in the main proceedings, provides as follows:

‘1. The exemption in the case of mergers provided for in Article 15(1)(h) of the Law applies in the case where a company acquires all, or a self-standing part, of another company in return for the grant of shares.

2. The term “grant of shares” is to be understood as covering the case where, in addition to the grant of shares, payment is made of a cash amount equivalent to a maximum of 10% of the value of the payment made on the shares.

…

7. For the purposes of applying the present article, a company means a public company, a private limited liability company, a partnership limited by shares, and any other company, all or part of the capital of which is divided into shares …’

Facts of the main proceedings and the question referred for a preliminary ruling

14 Zwijnenburg operated a clothes shop in two premises at Tolstraat 17 and 19 in Meerbeek (Netherlands). Zwijnenburg was the owner of the premises at Tolstraat 19 and rented the premises at Tolstraat 17 from A. Zwijnenburg Beheer BV (‘Beheer’), which was the owner of those premises and had as its sole activity the management of real property.

15 The shares in Beheer were held by Mr A.J. Zwijnenburg and his wife (‘the parents’).

16 The shares in Zwijnenburg were held, through a holding company, by Mr L.E. Zwijnenburg (‘the son’) and his wife.

17 In order to complete the transfer of the parents’ business to the son, a process which had already been set in motion in December 1990, it had been envisaged that Zwijnenburg would transfer its clothes business and the premises at Tolstraat 19 in return for shares in Beheer.

Pursuant to Article 14(1) of the 1969 Law on corporation tax, that company merger was to be exempt from tax.

18 At a subsequent stage, Zwijnenburg was to purchase the remaining shares in Beheer, which belonged to the parents and were accompanied by a purchase option. That operation was to benefit from an exemption from transaction tax, pursuant to the combined application of Article 15(1)(h) of the 1970 Law on the taxation of legal transactions and Article 5a(1) of the Decree implementing that law.

19 By letter of 13 January 2004, Zwijnenburg requested the tax authority to confirm that the proposed company merger of Zwijnenburg and Beheer and the subsequent purchase of Beheer shares by Zwijnenburg could be carried out on a basis free of charges and, in particular, without an obligation to pay transaction tax.

20 By decision of 19 January 2004, however, the Tax Inspector turned down that request on the ground that the proposed company merger came within the scope of Article 14(4) of the 1969 Law on corporation tax in so far as it was predominantly designed to avoid or defer taxation.

21 Following receipt of an objection, that inspector upheld his decision. On appeal, the Gerechtshof te ’s-Gravenhage (Regional Court of Appeal, The Hague) held that the action brought by Zwijnenburg against that decision was unfounded.

22 According to that court, the wish to bring together the premises at Tolstraat 17 and 19 within one single enterprise, the advantages of which would ultimately accrue to the son, was indeed based on valid commercial grounds. However, it took the view that the company-merger option chosen to bring both of those premises together was not motivated by commercial considerations, since Zwijnenburg was to transfer its business to Beheer and was subsequently to acquire the shares issued by Beheer.

23 The Gerechtshof te ’s-Gravenhage found that Zwijnenburg has not demonstrated to the requisite legal standard that tax evasion or tax avoidance were not the principal objective, or one of the principle objectives, of the proposed company merger. The only reason for carrying out that merger operation was, in its view, to avoid payment of the transaction tax which would be due in the event of a direct transfer of the premises at Tolstraat 17 to Zwijnenburg and to defer the corporation tax payable on the difference between the book value of those premises and their fair market value at the time of the transfer.

24 The Gerechtshof te ’s-Gravenhage concluded that, even if the ultimate purpose of the operation was dictated by commercial considerations, the financial arrangements adopted to that end were merely a stratagem to benefit from the tax advantages reserved for company mergers.

25 Zwijnenburg thereupon appealed on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

26 That court held that, by reason of the operation at issue, the parents would retain an interest in the business, even though their intention had been to withdraw from it in favour of the son and his wife. From this it inferred that one of the principal objectives of the proposed merger was to avoid certain tax consequences, in particular the transaction tax which would have been payable by Zwijnenburg if the premises at Tolstraat 17 had been purchased by Zwijnenburg or if the shares in Beheer had been transferred to it.

27 The Hoge Raad der Nederlanden states that Article 14 of the 1969 Law on corporation tax incorporates the provisions of Article 11(1)(a) of Directive 90/434 in order to apply them also to

purely internal situations. It finds, however, that transaction tax does not feature among the taxes which must not be levied under that directive.

28 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 11(1)(a) of Directive 90/434 … be interpreted as meaning that the benefits of that directive may be withheld from a taxpayer where a series of legal transactions is aimed at preventing the levying of a tax other than the taxes to which the benefits set out in that directive relate?’

The question referred for a preliminary ruling

Preliminary observations

29 All of the parties which submitted written observations, with the exception of Zwijnenburg, take the view that the Court should declare that it has jurisdiction to reply to the question which has been referred.

30 In that connection, it must be stated that, under Article 234 EC, the Court has jurisdiction to give preliminary rulings concerning, inter alia, the interpretation of the EC Treaty and that of acts of the institutions of the European Union.

31 It is, admittedly, common ground that the dispute in the main proceedings concerns a provision of national law which applies within a purely national context.

32 However, the national court has indicated that the Netherlands legislature had decided, when transposing the provisions of Directive 90/434, to apply the tax treatment provided for by that directive also to purely internal situations, with the result that national and cross-border restructuring operations are subject to the same merger taxation system.

33 According to the case-law of the Court, where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in European Union law in order, in particular, to avoid discrimination against nationals of the Member State in question or any distortion of competition, it is clearly in the European Union’s interest that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 32, and Case C-43/00 *Andersen og Jensen* [2002] ECR I-379, paragraph 18).

34 Moreover, it is for the national court alone to assess the precise scope of that reference to European Union law, the jurisdiction of the Court being confined to considering provisions of European Union law only (*Leur-Bloem*, paragraph 33).

35 It follows from the foregoing that the Court has jurisdiction to interpret the provisions of Directive 90/434, even though they do not directly govern the situation at issue in the main proceedings. The question submitted by the Hoge Raad der Nederlanden must for that reason be answered.

The question referred

36 By its question, the national court asks, in essence, whether Article 11(1)(a) of Directive 90/434 is to be interpreted as meaning that the favourable arrangements which that directive introduces may be withheld from a taxpayer who has sought, by way of a legal stratagem involving

a company merger, to avoid the levying of a tax such as that at issue in the main proceedings, namely transaction tax, even though that tax is not covered by that directive.

37 It appears from the case-file that, in the absence of an express national provision allowing the Netherlands tax authorities to refuse the benefit of the exemption from transaction tax in the event of a company merger in the case where it is established that the avoidance of that tax constitutes the predominant reason for the taxpayer to proceed with that merger, those authorities propose to apply Article 11(1)(a) of Directive 90/434 in such a way as to levy corporation tax as compensation for the transaction tax thus avoided.

38 So far as concerns the objective pursued by Directive 90/434, the Court has already stated that the aim of that directive is, according to the first recital in its preamble, to introduce tax rules which are neutral from the point of view of competition 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. That same recital also states that 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 from the tax provisions of the Member States (*Leur-Bloem*, paragraph 45).

39 More specifically, the objective of Directive 90/434 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 (Case C?321/05 *Kofoed* [2007] ECR I?5795, paragraph 32, and Case C?285/07 *A.T*. [2008] ECR I--?9329, paragraph 28).

40 To that end, Directive 90/434 provides, inter alia in Article 4, that a merger or division is not to give rise to any taxation of capital gains calculated by reference to the difference between the real value of the assets and liabilities transferred and their value for tax purposes, and, in Article 8, 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 is not, of itself, to give rise to any taxation of the income, profits or capital gains of that shareholder.

41 The Court has also held that the common tax rules laid down by Directive 90/434, which cover different tax advantages, apply without distinction to all mergers, divisions, transfers of assets or exchanges of shares irrespective of the reasons, whether financial, economic or simply fiscal, for those operations (*Leur-Bloem*, paragraph 36, and *Kofoed*, paragraph 30).

42 It follows that the determination of which transactions are eligible to benefit from the favourable arrangements introduced by Directive 90/434 is not dependent on financial, economic or fiscal considerations. By contrast, the reasons for the proposed transaction are important in the implementation of the option provided for in Article 11(1) of that directive.

43 Thus, under Article 11(1)(a) of Directive 90/434, Member States may refuse to apply, or may withdraw the benefit of, all or any part of the provisions of that directive, inter alia, where the exchange of shares has tax evasion or tax avoidance as its principal objective or as one of its principal objectives. That same provision also provides that the fact that the operation is not carried out for valid commercial reasons, such as the restructuring or rationalisation of the activities of the companies participating in the operation, may constitute a presumption that the operation has such an objective (*Leur-Bloem*, paragraphs 38 and 39, and *Kofoed*, paragraph 37).

44 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 subject each particular case to a general examination (*Leur-Bloem*, paragraph 41).

45 It is 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 that directive (*Kofoed*, paragraph 37, and *A.T.*, paragraph 31).

46 Consequently, Article 11(1)(a) of Directive 90/434, as a provision setting out an exception, must be subject to strict interpretation, regard being had to its wording, purpose and context.

47 By making reference, as regards valid economic reasons, to the restructuring or rationalisation of the activities of the companies participating in the operation in question, in which case there can be no presumption of tax evasion or tax avoidance, that provision is therefore clearly limited to company mergers and other reorganisational operations concerning them and is applicable only to taxes arising from those operations.

48 The foregoing findings are further supported by the fact that, as European Union law stands at present, direct taxation does not, as such, come within its remit.

49 As the Advocate General stated in point 52 of her Opinion, Directive 90/434 does not lead to a comprehensive harmonisation of the taxes that can be charged on a merger or on a similar operation between companies of different Member States. By introducing tax rules which are neutral from the point of view of competition, that directive confines itself to resolving certain tax disadvantages connected with the cross-border restructuring of undertakings.

50 It follows that only the taxes expressly referred to in Directive 90/434 may benefit from the favourable arrangements which that directive introduces and are, therefore, liable to come within the scope of the exemption provided for in Article 11(1)(a) thereof.

51 In the context of the favourable arrangements which it introduces, Directive 90/434, while conferring particular significance to the levying of capital gains tax, relates essentially to taxes levied on companies as well as on their shareholders.

52 By contrast, there is nothing in that directive to suggest that it intended to extend the benefit of those favourable arrangements to other taxes, such as that at issue in the main proceedings, which is a tax levied on the acquisition of real property situated in the Member State concerned.

53 Such a case must be regarded as continuing to come within the scope of the fiscal powers of the Member States.

54 In those circumstances, the benefit of the favourable arrangements introduced by Directive 90/434 cannot be withheld, under Article 11(1)(a) of that directive, in order to compensate for the non-payment of a tax, such as that at issue in the main proceedings, the basis and rate of which necessarily differ from those applicable to mergers of companies and other reorganisational operations concerning them.

55 Pursuing a different approach would not only have the result of compromising the uniform and consistent interpretation of Directive 90/434, but would also go beyond what is necessary to safeguard the financial interests of the Member State concerned, as set out in the fourth recital in the preamble to that directive. As the Advocate General stated in point 66 of her Opinion, if the principal objective of a proposed merger is to avoid transaction tax, the financial interests of the Member State concerned are confined specifically to the levying of that transaction tax and are

thus outside the scope of that directive.

56 In the light of the foregoing, the answer to the question is that Article 11(1)(a) of Directive 90/434 is to be interpreted as meaning that the favourable arrangements which that directive introduces may not be withheld from a taxpayer who has sought, by way of a legal stratagem involving a company merger, to avoid the levying of a tax such as that at issue in the main proceedings, namely transaction tax, where that tax does not come within the scope of application of that directive.

Costs

57 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 11(1)(a) 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 is to be interpreted as meaning that the favourable arrangements which that directive introduces may not be withheld from a taxpayer who has sought, by way of a legal stratagem involving a company merger, to avoid the levying of a tax such as that at issue in the main proceedings, namely transaction tax, where that tax does not come within the scope of application of that directive.

[Signatures]

* Language of the case: Dutch.