

Court Refers Shareholder Loan Taxation Case to ECJ

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Poland's Supreme Administrative Court on July 8 submitted to the European Court of Justice a preliminary question regarding the application of the EC directive of July 17, 1969 (no. 69/335/EEC), to indirect taxes paid on capital raised in transactions that took place before Poland's accession to the European Union.

The Supreme Administrative Court referred to the ECJ regarding a complaint against a decision of the Provincial Administrative Court in Poznan (I SA/Po 351/06, Nov. 14, 2006), which dismissed a request for acknowledgment of overpayment of the tax on civil law transactions.

The plaintiff is a company involved in the construction of a power plant in central Poland. The company paid the Polish equivalent of the capital tax, the so-called tax on civil law transactions, twice on the same capital: first on the receipt of a loan from its shareholder, before Poland's accession to the EU; and again on increased share capital from the inclusion of the loan amount in the share capital (through contractual deduction), following Poland's accession to the EU.

The company later petitioned for acknowledgment of overpayment of the tax on civil law transactions,

invoking article 5, section 3, para. 2 of EC Directive 69/335, which provides that the amount subject to tax on capital increases must not include the amount of loans taken up by the capital company that are converted into shares in the company and that have already been subjected to capital tax.

The Provincial Administrative Court refused to acknowledge the overpayment and invoked the fact that the loan (and the duty paid thereon) was executed before Poland's accession to the European Union, so the provision of the Polish legal act implementing the aforementioned directive, which didn't come into effect until May 1, 2004, did not apply.

The judges of the Supreme Administrative Court trust that the ECJ will decide that loans granted and taxed before Poland's accession to the EU should decrease the tax base on recapitalization of the company, which occurred following Poland's accession to the European Union.

The prejudicial question was submitted by the Supreme Administrative Court under article 234 of the EC Treaty. The decision is expected in about a year. Hopefully the ECJ will not declare itself incompetent because the case partially refers to the period before Poland's accession to the EU. ◆

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