OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 13 November 1990 *

Mr President,
Members of the Court,

1. The question contained in the reference made by the Hoge Raad der Nederlanden again requests the Court to interpret Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 [1] (hereinafter referred to as 'the Directive') concerning indirect taxes on the raising of capital.

2. The facts may be summarized as follows. From 1972 the holding company Deltavisie BV ('Deltavisie') held all the shares in the company Deltakabel BV ('Deltakabel'). Until 1980, Deltakabel's losses were taken over by Deltavisie through a current account operated between the two companies. However, Deltavisie was due to sell its shares in Deltakabel on 1 January 1981 to an associated company, Beleggingsmaatschappij Mastbos BV. For the purposes of that transaction it waived a portion, amounting to HFL 17 276 636, of its claim against Deltakabel. The asset value of Deltakabel was assessed at HFL 1, the price at which the shares were sold to Beleggingsmaatschappij Mastbos BV. By a notice of 4 April 1984 the Netherlands tax authorities charged capital duty on that remission of debt. Deltakabel argued before the Gerechtshof (Court of Appeal), The Hague that the debt was not a real debt but an accounting item indicating the sums already credited in order to clear off debts. That court rejected that view. It considered that in view of the legally separate nature of the two companies there was a debt due from Deltakabel to Deltavisie. The Hoge Raad, before which an appeal in cassation was brought, decided that that assessment of the facts was sufficiently reasoned and that there was no ground to overturn it. That question is therefore not one of the matters which need concern us today.

3. However, on the proposal of its Advocate General, that supreme court has requested the Court of Justice for an interpretation of Article 4(2)(b) of the Directive in order to ascertain in substance whether the remission of debt granted by a member attracts capital duty in so far as that provision requires that the remission should be capable of increasing the value of the company's shares.

4. Article 4(2)(b) of the Directive provides that the Member States may subject to capital duty '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 a variation in the rights in the

* Original language: French.
1 — OJ, English Special Edition 1969 (II), p. 412.

company or which may increase the value of the company's shares'.

5. The Court has consistently held that:

'According to the principles on which harmonized capital duty is based, such duty should be charged only on transactions which constitute in law the raising of capital and only in so far as they contribute to increasing the company's economic potential'. [2]

6. In his Opinion on the case the Advocate General at the Hoge Raad indicated, however, that views were divided amongst academic writers in the Netherlands. For example, Mr van Kalmthout considers that a write-off of funds 'storting à fonds perdus' need not always be subject to capital duty, in particular where it is intended to clear off a liability if no increase in the value of the company's shares results. [3] Mr Aardema, on the other hand, considers that the transformation of a liability into a lesser liability is a form of increase in value. [4] Finally, according to Mr Tijnagel, capital duty is payable only in so far as, owing to the remission of debt, the value of the subsidiary's shares increase so as to exceed the nominal share capital. [5]

7. According to the case-law of the Court, it is a question of whether or not there is a 'strengthening of the economic potential' of the undertaking in question. In my view, any remission of debt is of necessity likely to reinforce that potential, even if the company's assets largely exceed its liabilities and continue to do so despite the member's waiver of his claim since the chances of the undertaking becoming viable again are increased. In other words, the reduction of a deficit as a result of the remission of a debt, making it easier for example for the undertaking to be taken over by a third party, is quite capable of increasing the value of the company's shares.

8. That view is also held by the Commission and the Netherlands Government, which has intervened in these proceedings.

9. In its recent judgment in the *Siegen* case, the Court in fact stated that:

'... when a company has incurred losses and one of its shareholders agrees to absorb those losses, that shareholder makes a contribution which increases the assets of the company. He restores the assets to the level which they had reached before the losses were sustained'. [6]

In my view, the same reasoning applies where only a part of the liability is cleared off.

2 — Judgment in Case 270/81 *Felicitas Rickmers-Linie KG & Co.* v *Finanzamt für Verkehrsteuern* [1982] ECR 2771, paragraph 16 at p. 2784; see also the judgment in Case 36/86 *Ministeriet for Skatter og Afgifter* v *Dansk Sparinvest* [1988] ECR 409, paragraphs 13 and 14.

3 — *Fiscale aspecten van ondernemingen*, 'Opstellen aangeboden aan Prof. D. A. M. Meeles' (1985), p. 83, cited by the Advocate General at the Hoge Raad der Nederlanden.

4 — WFR 1986/5734, p. 830.

5 — WFR 1988/5735, p. 875.

6 — Judgment in Case C-38/88 *Waldrich Siegen Werkzeugmaschinen GmbH* v *Finanzamt Hagen* [1990] ECR I-1447.

10. I therefore propose that the Court should rule:

'The partial clearing-off of a liability of a capital company through the waiver by one of its members of a claim which he has against that company may be subjected to capital duty under Article 4(2)(b) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital.'