JUDGMENT OF THE COURT

18 November 1999 *

In Case C-200/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Regeringsrätten, Sweden, for a preliminary ruling in the proceedings pending before that court between

X AB,

Y AB

and

Riksskatteverket

on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC), Article 53 of the EC Treaty (repealed by the Treaty of Amsterdam), Article 54 of the EC Treaty (now, after amendment, Article 44 EC), Article 55 of the EC Treaty (now Article 45 EC), Articles 56 and 57 of the EC Treaty (now, after amendment, Articles 46 EC and 47 EC) and Articles 58, 73b and 73d of the EC Treaty (now Articles 48 EC, 56 EC and 58 EC),

* Language of the case: Swedish.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur), L. Sevón, R. Schintgen (Presidents of Chambers), C. Gulmann, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: A. Saggio,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Riksskatteverket, by K.-G. Kjell, Avdelningsdirektör at the Riksskatteverket,

— the Commission of the European Communities, by H. Michard and K. Simonsson, of its Legal Service, and F. Riddy, a national official on secondment to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Swedish Government, represented by A. Kruse, Departementsråd at the Ministry of Foreign Affairs, acting as Agent; of the Netherlands Government, represented by A. Fierstra, Head of the European Law Department at the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by K. Simonsson and F. Riddy, at the hearing on 20 April 1999,

after hearing the Opinion of the Advocate General at the sitting on 3 June 1999,

gives the following

Judgment

1 By order of 29 April 1998, received at the Court on 22 May 1998, the Regeringsrätten (Swedish Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC), Article 53 of the EC Treaty (repealed by the Treaty of Amsterdam), Article 54 of the EC Treaty (now, after amendment, Article 44 EC), Article 55 of the EC Treaty (now Article 45 EC), Articles 56 and 57 of the EC Treaty (now, after amendment, Articles 46 EC and 47 EC) and Articles 58, 73b and 73d of the EC Treaty (now Articles 48 EC, 56 EC and 58 EC).

2 The question has been raised in proceedings brought by two Swedish companies, X AB and Y AB, against a preliminary decision delivered by the Skatterättsnämnden (Revenue Law Commission).

3 In the Swedish legal system, the Regeringsrätten is the body to which appeals against decisions of the Skatterättsnämnden may be made. Under Lagen (1951:442) om Förhandsbesked i Taxeringsfrågor (Law on Preliminary Decisions on Tax Matters 1951:442), the Skatterättsnämnden has jurisdiction to deliver, upon application by taxpayers, binding preliminary decisions on the application of tax legislation, in particular national or local direct taxes.

4 As part of a group reorganisation, the Swedish companies X AB, which is the parent company, and Y AB, its subsidiary, applied in June 1996 to the Skatterättsnämnden for a preliminary decision on the application to them, for the years 1997 to 1999, of the provisions governing intra-group transfers

contained in Article 2(3) of Lagen (1947:576) om Statlig Inkomstskatt (Law on State Income Tax 1947:576, hereinafter 'the SIL'). This provides that, on certain conditions, transfers between companies belonging to the same group may benefit from tax relief. Under that rule, if a Swedish company owns more than nine tenths of the shares in another Swedish company, intra-group transfers between the first company and the second company are treated as deductible expenses for the transferring company and as taxable income for the transferee. The aim of that group transfer rule is to prevent the tax burden borne by a business carried on by a number of undertakings in a group from being greater than if it is carried on by a single undertaking.

5 When the application for a preliminary decision was made, the group concerned owned 99.8% of the shares in Y AB. Approximately 58% of those shares was owned directly by X AB. Subsidiaries controlled entirely by the latter company held the rest of the share capital of Y AB.

6 A preliminary decision was sought from the Skatterättsnämnden on in particular the possibility of obtaining in three different cases the tax relief provided for by Article 2(3) of the SIL.

7 In the first case, the shares in Y AB would be owned exclusively by X AB and its Swedish subsidiary which it controls entirely. In the second case, the company Z BV, a Netherlands subsidiary which X AB owns entirely, would acquire 15% of the shares in Y AB. In the third case, Z BV and the company Y GmbH, which is a German subsidiary wholly owned by X AB, would each acquire 15% of the shares in Y AB.

8 On 22 November 1996, the Skatterättsnämnden delivered its preliminary decision on the application made by the companies X AB and Y AB. As regards the first case, it considered that the rule in the first subparagraph of Article 2(3) of the SIL did not allow an intra-group transfer to benefit from the relief provided for in that provision. That rule requires that the Swedish company must own

more than nine tenths of the shares in the other Swedish company. However, the transfer could benefit from those effects under the merger rule in the second subparagraph, which extends the tax relief to transfers made by a parent company to a subsidiary which it does not wholly own if throughout the tax year the ownership relationships were such that, as a result of the mergers between the parent company and the subsidiary, the latter could have been absorbed by the parent company.

9 As regards the second case, the Skatterättsnämnden considered that the same rule was applicable. It explained that, although only Swedish companies could benefit from this rule, it was clear from the case-law of the Regeringsrätten that it would be contrary to the clause prohibiting discrimination on grounds of ownership contained in a convention for the prevention of double taxation, such as that concluded between the Kingdom of Sweden and the Kingdom of the Netherlands, for companies established in those Member States to be refused the possibility of carrying out intra-group transfers with the related tax advantages provided for by the SIL.

10 However, in the third case, the Skatterättsnämnden ruled that the merger rule did not apply. This ruling was based on the fact that the case-law of the Regeringsrätten prohibited the cumulative application of two double-taxation agreements such as those which had been concluded between the Kingdom of Sweden, on the one hand, and the Federal Republic of Germany and the Kingdom of the Netherlands, on the other. According to that case-law, the simultaneous application of two or more agreements is excluded because the provisions of each of those agreements are meant to be applied only to undertakings of the signatory States and not to those of third States. The Skatterättsnämnden also ruled out the possibility that the result at which it had arrived could be affected by Community law.

11 The companies X AB and Y AB appealed against that preliminary decision to the Regeringsrätten. They argued that, as regards the refusal of tax relief for intra-group transfers in the third case, the decision arrived at by the Skatterättsnämn-

den constituted discrimination prohibited by the Treaty in that it was contrary in particular to Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and Articles 52, 58 and 73b of that Treaty.

12 Taking the view that an interpretation of Community law was needed in order to decide the case, the Regeringsrätten stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Under Article 2(3) of Law 1947:576 on State Income Tax, an intra-group transfer is treated, under certain conditions, as having fiscal effect if it is made by a Swedish limited liability company to another Swedish limited liability company which is wholly owned either by the first-named company directly or by that company together with a wholly-owned Swedish subsidiary or subsidiaries. The fiscal result is the same if one, or more, of the wholly-owned subsidiaries is foreign provided that they have their seat in *one and the same* Member State and Sweden has concluded with that State a double-taxation agreement containing a non -discrimination clause. Against that background, is it compatible with existing Community law, in particular Article 52 in combination with Article 58 and Article 73b and d of the Treaty of Rome, to apply a set of rules under which an intra-group transfer is not treated as having the same fiscal effect when the Swedish parent company instead owns the recipient company together with two or more wholly-owned foreign subsidiaries which have their seat in *different* Member States with which Sweden has concluded a double-taxation agreement containing a non-discrimination clause?'

Admissibility of the reference for a preliminary ruling

13 It should first be considered whether the Regeringsrätten may be regarded as a 'national court or tribunal' for the purposes of Article 177 of the Treaty when it rules on an appeal from a preliminary decision delivered by the Skatterätts-

nämnden. It will then be necessary to verify that the Court is being asked for an interpretation of Community law in the context of a genuine dispute and not in a purely hypothetical case.

14 It is settled case-law that in order to determine whether a body making a reference for a preliminary ruling is a court or tribunal within the meaning of Article 177 of the Treaty, which is a question governed by Community law alone, the Court will take account of a number of factors, such as whether the referring body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see Case 61/65 *Vaassen (née Göbbels)* [1966] ECR 261, at 272 and 273, and Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23).

15 Furthermore, national courts may refer questions to the Court only if there is a case pending before them and they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, the order of 18 June 1980 in Case 138/80 *Borker* [1980] ECR 1975, paragraph 4 and the judgment in Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14).

16 As the Advocate General points out in paragraph 12 of his Opinion, since there appears to be no doubt that the Regeringsrätten satisfies all the other conditions laid down by the case-law of the Court, it only remains to determine whether the Regeringsrätten is called upon to give judgment in proceedings which are intended to lead to a judicial decision, when seised with an appeal against a ruling of the Skatterättsnämnden.

17 It is sufficient to observe here that, in the case of an appeal, the purpose of the procedure before the Regeringsrätten is to review the legality of a preliminary decision which, once it becomes definitive, binds the tax authorities and serves as

the basis for the assessment to tax if and to the extent to which the person who applied for the preliminary decision continues with the action envisaged in his application. In those circumstances, the Regeringsrätten must be held to be carrying out a judicial function (see, in particular, *Victoria Film*, cited above, paragraph 18).

18 As regards the hypothetical nature of the question submitted, it is to be remembered that the Court has stated that, by virtue of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, for example, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10, and Case C-125/94 *Aprile* [1995] ECR I-2919, paragraph 16).

19 Consequently, since the questions submitted by the national court relate to the interpretation of a provision of Community law, the Court is in principle bound to give a ruling (see Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 24, and *Aprile*, cited above, paragraph 17).

20 The position would be different only if the Court were called on to give a ruling on a problem of a hypothetical nature (see Case 244/80 *Foglia* [1981] ECR 3045, paragraphs 18 and 20, and *Meilicke*, cited above, paragraph 25).

21 As regards the circumstances in which the Court has been asked to give a preliminary ruling in this instance, it is true that the national court which made the reference is called on to give a ruling in proceedings concerning the possibility

for X AB to carry out in the future an intra-group transfer for the benefit of Y AB under certain conditions. On the date on which its decision to make a reference was made, X AB had still not carried out that transfer.

22 However, that circumstance is not by nature such as to render the preliminary question inadmissible. The national court is seised of a genuine dispute, so that, far from being asked to rule on a hypothetical problem, the Court has sufficient information at its disposal regarding the circumstances with which the main proceedings are concerned to enable it to interpret the rules of Community law and to give a helpful answer to the question submitted to it (see *Aprile*, cited above, paragraph 20).

23 Since that condition is satisfied by the reference for a preliminary ruling, the Regeringsrätten, when acting in the procedure which led to the making of this reference for a preliminary ruling, must be regarded as a national court or tribunal within the meaning of Article 177 of the Treaty, so that the preliminary question is admissible.

Substance

24 The case referred involves three types of intra-group transfer:

— transfers made between two public limited companies in a Member State when the second of those companies is wholly owned by the first, either directly or together with one or more subsidiaries which are themselves

established in that Member State and which the latter owns entirely (hereinafter referred to as 'type A intra-group transfers');

— transfers made between two public limited companies established in a Member State when the second of those companies is wholly owned by the first together with one or more subsidiaries which it owns entirely and which have their seat in the same other Member State with which the first Member State has concluded an agreement for the prevention of double taxation which contains a non-discrimination clause (hereinafter referred to as 'type B intra-group transfers');

— transfers between two public limited companies in a Member State when the second of those companies is wholly owned by the first together with several other subsidiaries which it owns entirely and which have their seats in various other Member States with which the first Member State has concluded agreements for the prevention of double taxation which contain a non-discrimination clause (hereinafter referred to as 'type C intra-group transfers').

25 The national court is asking essentially whether Articles 52 and 58 of the Treaty, on freedom of establishment, and Articles 73b and 73d of the Treaty, on free movement of capital, preclude national provisions, such as those at issue in the main proceedings, under which type A and type B intra-group transfers can benefit from certain tax concessions whereas type C transfers cannot.

26 As far as the provisions concerning freedom of establishment are concerned, it must be pointed out that, even though, according to their wording, those provisions are mainly aimed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in

another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 of the Treaty (Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 16, and Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21).

27 The legislation in question in the main proceedings does not allow Swedish companies which have used their right to free establishment to form subsidiaries in other Member States to receive certain tax concessions upon a type C intra-group transfer.

28 Thus, such legislation entails a difference of treatment between various types of intra-group transfers on the basis of the criterion of the subsidiaries' seat. In the absence of justification, that difference of treatment is contrary to the provisions of the Treaty concerning freedom of establishment. It does not make any difference in this regard that the case-law of the Regeringsrätten allows type B transfers to be given the same treatment accorded to type A transfers.

29 In the case submitted, the Swedish Government has not attempted to justify the difference of treatment found above with regard to the provisions of the Treaty on freedom of establishment. Moreover, at the hearing before this Court, the Swedish Government openly acknowledged that the legislation in question is contrary to Article 52 of the Treaty.

30 Having regard to all the foregoing, it is not necessary to examine whether the provisions of the Treaty relating to the free movement of capital preclude legislation such as that in question in the main proceedings.

31 Consequently, the answer to be given to the question submitted should be that, where a Member State grants certain tax relief in respect of intra-group transfers made between two public limited companies established in that Member State

and the second of those companies is wholly owned by the first, either directly or together with

— one or more subsidiaries which are themselves established in that Member State and which it owns entirely, or

— one or more subsidiaries which it owns entirely and which have their seats in another Member State with which the first Member State has concluded an agreement for the prevention of double taxation which contains a non-discrimination clause,

Articles 52 to 58 of the Treaty preclude that tax relief from being refused in respect of transfers made between two public limited companies established in that Member State, where the second of those companies is wholly owned by the first together with several subsidiaries which it owns entirely and which have their seat in various other Member States with which the first Member State has concluded agreements for the prevention of double taxation which contain a non-discrimination clause.

Costs

32 The costs incurred by the Swedish and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings,

a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Regeringsrätten by order of 29 April 1998, hereby rules:

Where a Member State grants certain tax relief in respect of intra-group transfers made between two public limited companies established in that Member State and the second of those companies is wholly owned by the first, either directly or together with

— **one or more subsidiaries which are themselves established in that Member State and which it owns entirely, or**

— **one or more subsidiaries which it owns entirely and which have their seats in another Member State with which the first Member State has concluded an agreement for the prevention of double taxation which contains a non-discrimination clause,**

Article 52 of the EC Treaty (now, after amendment, Article 43 EC), Article 53 of the EC Treaty (repealed by the Treaty of Amsterdam), Article 54 of the EC Treaty (now, after amendment, Article 44 EC), Article 55 of the EC Treaty (now Article 45 EC), Articles 56 and 57 of the EC Treaty (now, after amendment, Articles 46 EC and 47 EC) and Article 58 of the EC Treaty (now Article 48 EC) preclude that tax relief from being refused in respect of transfers made between two public limited companies established in that Member State, where the second of those companies is wholly owned by the first together with several subsidiaries which it owns entirely and which have their seat in various other Member States with which the first Member State has concluded agreements for the prevention of double taxation which contain a non-discrimination clause.

Rodríguez Iglesias Moitinho de Almeida

Edward Sevón Schintgen Gulmann

Jann Ragnemalm Wathelet

Delivered in open court in Luxembourg on 18 November 1999.

R. Grass G.C. Rodríguez Iglesias

Registrar President