

SCHMID

JUDGMENT OF THE COURT (Fifth Chamber)

30 May 2002 *

In Case C-516/99,

REFERENCE to the Court under Article 234 EC by the Berufungssenat V der Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Austria) for a preliminary ruling in the proceedings brought by

Walter Schmid

on the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr, D.A.O. Edward, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

* Language of the case: German.

after considering the written observations submitted on behalf of:

- the Austrian Government, by H. Dossi, acting as Agent,
- the French Government, by K. Rispal-Bellanger and S. Seam, acting as Agents,
- the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2002,

gives the following

Judgment

- 1 By order of 2 December 1999, received at the Court on 30 December 1999, the Berufungssenat V der Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Fifth Appeal Chamber of the regional finance authority for Vienna, Niederösterreich and Burgenland) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC).

- 2 Those questions were raised in the course of an appeal brought by Mr Schmid, resident in Austria, against his income tax assessment notice for 1997 issued by the Finanzamt für den 9., 18. und 19. Bezirk in Wien (finance authority for the 9th, 18th and 19th Districts in Vienna), seeking a reduction in the tax on dividends which were paid to him by a company established in a Member State other than the Republic of Austria.

The relevant national legislation

- 3 The provisions relevant to the main proceedings are those of the Einkommensteuergesetz 1988 (1988 Law on Income Tax, BGBl. 1988/400; 'the EStG').
- 4 Paragraph 93(1) and (2)(1)(a) of the EStG, as amended by the federal law published at BGBl. 1996/201, provides in relation to revenue from capital assets taxable at source:

'(1) In the case of domestic revenue from capital assets (subparagraph 2)... income tax shall be levied by deduction from revenue from capital assets (Kapitalertragsteuer — tax on revenue from capital assets).

(2) Domestic revenue from capital assets exists where the person liable to pay revenue from capital assets has its residence, head office or seat in Austria or is

the branch office in Austria of a credit institution and the revenue from capital assets consists of:

1.(a) shares of profits (dividends), interest and other earnings from shares, shares in limited liability companies...’.

5 Under Paragraph 95(1) of the EStG, as amended by the federal law published at BGBl. 1996/201, the tax rate on revenue from capital assets is 25%.

6 Paragraph 97 of the EStG, as amended by the federal law published at BGBl. 1996/797, provides:

‘(1) For natural persons and corporations, in so far as corporations receive revenue from capital assets, income tax (corporation tax) on revenue from capital assets in accordance with Paragraph 93(2)(3)... which is subject to tax on revenue from capital assets shall be treated as paid by the withholding of tax. For natural persons, that rule shall apply also to revenue from capital assets, in accordance with Paragraph 93(2)(1)...

(2) For natural persons and corporations, in so far as corporations receive revenue from capital assets, income tax (corporation tax) on domestic revenue from capital assets in the form of bonds not subject to tax on revenue from capital assets shall be treated as paid by voluntary payment of an amount equivalent to the tax on revenue from capital assets to the coupon-issuing authority....

(3) In so far as the tax is paid under subparagraph 1 or 2, the revenue from capital assets shall not be taken into account in the aggregate amount of revenue or income (Paragraph 2(2)). That rule shall apply only when calculating the income tax of the taxpayer.

...’.

- 7 Paragraph 37(1) and (4) of the EStG, as amended by the federal law published at BGBl. 1996/797, regulates as follows the possibility of opting for the 50% tax rate regime (‘the 50% rate procedure’ — ‘Halbsatzverfahren’), which concerns income tax payable in respect of shareholdings:

‘(1) The tax rate shall be reduced in respect of:

— revenue from shareholdings (subparagraph 4),

...

to half of the average tax rate applicable to the aggregate income...

(4) Revenue from shareholdings shall mean:

1. share income:

(a) shares of profits of any kind from shareholdings in domestic limited companies or industrial and provident societies in the form of shares in companies or cooperatives...

...?.

The main proceedings and the questions referred for a preliminary ruling

- 8 Mr Schmid is resident in Austria. In 1997, part of his income was made up of dividends from shares in MAN AG, a company established in Germany.
- 9 The Austrian tax authorities included the foreign share dividends which he had received in Mr Schmid's income tax assessment for 1997. The average tax rate applicable to Mr Schmid's income, calculated on the basis of the sum of his domestic income, his revenue from capital assets and his earnings from abroad, was 27.17%. The income from foreign shares held by Mr Schmid was taxed at that rate.

- 10 The tax on revenue from capital assets, which had already been paid by Mr Schmid in the Federal Republic of Germany, was credited in full against his tax liability in Austria.

- 11 On 3 December 1998, Mr Schmid appealed against his income tax assessment notice for 1997. By letter of 3 June 1999, he sought a ruling on his appeal from the Fifth Appeal Chamber of the regional finance authority for Vienna, Niederösterreich and Burgenland, the appellate tax authority. He applied, in particular, for the dividends received in respect of the shares in MAN AG to be subject to a tax rate equal to half that applied to his other income, although Paragraph 37 of the EStG in conjunction with Paragraph 97 of that law in the version in force at the material time does not afford the option of taxation at the 50% rate to a taxpayer who receives dividends from limited companies having their seat outside Austria. For a taxpayer in such a situation, the revenue from capital assets in the form of shareholdings in companies situated in a State other than the Republic of Austria is added to his other income and subject to income tax at the resulting average rate.

- 12 The Fifth Appeal Chamber seeks to ascertain whether rules such as those in Paragraphs 37(1) and (4) and 97 of the EStG, in the version in force at the material time, are compatible with the provisions of the Treaty on free movement of capital.

- 13 On the one hand, dividends from Austrian shares are subject in Austria to tax on revenue from capital assets, which, in general, takes the form of a deduction at source by the company distributing dividends and is final, with the result that the dividends are not included in the basis of assessment for income tax. The taxpayer may, however, request that those dividends be exempted from the withholding at source by way of tax on revenue from capital assets, but included in the basis of assessment for income tax, in which case they are subject to that tax at a rate equal to half the average tax rate applied to his other income.

- 14 On the other hand, dividends from foreign shares, which are not subject in Austria to the final withholding at source by way of tax on revenue from capital assets, are therefore subject in full to income tax there and cannot, moreover, benefit from the application of the 50% tax rate.
- 15 The Fifth Appeal Chamber seeks to ascertain whether that distinction is contrary to Article 73b(1) of the Treaty and, if so, whether it could be justified under Article 73d(1)(a) of the Treaty. The fact that Austrian companies which distribute dividends have, in general, already been subject to corporation tax at 34% might constitute such a justification. The Chamber is not, however, certain that there is an objective justification for the disadvantageous treatment of those taxpayers who have foreign earnings.
- 16 In those circumstances, the Fifth Appeal Chamber of the regional finance authority for Vienna, Niederösterreich and Burgenland decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Does Article 73b(1) in conjunction with Article 73d(1)(a) and (b) and (3) of the EC Treaty (now Article 56(1) in conjunction with Article 58(1)(a) and (b) and (3) EC) preclude a provision such as Paragraph 97 of the Einkommensteuergesetz (“EStG”; Law on Income Tax) of 1988 (BGBl. 1988/400; as amended, BGBl. 1996/797), which provides (pursuant to Paragraph 1(1)(1)(c) of the Endbesteuerungsgesetz (Law on Final Taxation), BGBl. 1993/11) that final taxation of dividends, interest and other earnings from foreign shares is excluded, and thus the rate of taxation in respect of domestic shares is 25%, whereas the rate of taxation in respect of foreign shares may be up to 50%?’

- (2) Does Article 73b(1) in conjunction with Article 73d(1)(a) and (b) and (3) of the EC Treaty (now Article 56(1) in conjunction with Article 58(1)(a) and (b) and (3) EC) preclude a provision such as Paragraph 37(1) and (4) of the EStG of 1988 (BGBl. 1988/400), which provides that shares of profits of any kind from shareholdings in domestic limited companies in the form of shares are subject to a tax rate reduced to half of the average tax rate applicable to the aggregate income, but that shares of profits of any kind from shareholdings in limited companies whose seat and place of management are in another EU Member State or a non-Member State are not subject to any reduction of that kind?’

The jurisdiction of the Court

- 17 As a preliminary point, it is necessary to verify whether the Fifth Appeal Chamber is a court or tribunal of a Member State within the meaning of Article 234 EC.

National legislation on the appeal chambers of regional finance authorities

- 18 Paragraph 263(1) of the Bundesabgabenordnung (Federal Code on Taxes, ‘the BAO’) provides for the establishment for each *Land* of an appeal commission whose business is to be managed by the President of the regional finance authority. Each appeal commission is to consist of, first, members delegated by the statutory professional representative bodies and, second, members nominated by the Federal Finance Minister (Paragraph 263(2) of the BAO) or the President

of the regional finance authority. Paragraph 267(1) of the BAO provides that appeal commission members are to have a fixed mandate of six years.

- 19 Under Paragraph 270(1) of the BAO, the President of the regional finance authority is to establish appeal chambers and nominate their members on the basis of the lists of appeal commission members. Under Paragraph 270(3), each appeal chamber is to consist of five members: a president, who is the President of the regional finance authority (or a finance official nominated by him), another finance official and three members chosen from amongst the professional bodies' delegates to the appeal commission. There is no provision regulating the question of the length of the mandate of appeal chamber members.

- 20 The members of the appeal chambers are not bound by any directions in the exercise of their functions (Paragraph 271(1) of the BAO). They swear on oath to take impartial decisions (Paragraph 271(2) of the BAO). Where there is a well-founded suspicion of partiality, they must withdraw (Paragraph 283(3) of the BAO).

- 21 Paragraphs 260(2) and 261 of the BAO define the cases in which the appeal chamber has jurisdiction. Under Paragraph 243 of the BAO, appeal is the only statutory means of challenging a decision of the tax authorities.

- 22 A hearing before the appeal chamber takes place if the president of the chamber deems it necessary, if the chamber so decides at the request of one of its members or if a party so requests (Paragraph 284(1) of the BAO). The tax authority which adopted the contested decision is not itself party to the proceedings before the appeal chamber.

- 23 The appeal chamber is empowered to amend any element of the contested decision and to annul it (Paragraph 289(2) of the BAO).
- 24 It is clear from Article 18(1) of the Bundes-Verfassungsgesetz (Federal Constitution) that the appeal chamber does not adjudicate according to equity, but applies rules of law.
- 25 According to the documents before the Court, it is possible to appeal against the decision of an appeal chamber to the Verwaltungsgerichtshof (Administrative Court) or, on the ground of unconstitutionality, to the Verfassungsgerichtshof (Constitutional Court). In particular, the President of the regional finance authority has power to bring an appeal before the Administrative Court against the decision of the appeal chamber (Paragraph 292 of the BAO).
- 26 The possibilities for *ex post facto* correction of the decision of the appeal chamber are defined by legislation: manifest errors may be corrected (Paragraphs 293, 293a and 293b of the BAO), decisions relating to advantages derived from a change of situation may be annulled or amended (Paragraph 294 of the BAO) or an ancillary decision may be adapted to the amendment of the collection notice (Paragraph 295 of the BAO).
- 27 A decision of the appeal chamber may be annulled by the Finance Ministry only on the ground of the unlawfulness of its content, where it is challenged by means of an appeal to the Administrative Court or the Constitutional Court (Paragraph 299 of the BAO).

Observations submitted to the Court

- 28 It is the contention of the Austrian Government, the Commission and the referring body itself that an authority such as the Fifth Appeal Chamber must be regarded as a court or tribunal within the meaning of Article 234 EC.
- 29 In their submission, such an authority satisfies the conditions laid down in the Court's case-law, in particular in Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23 (and the case-law there cited), namely that the body is established by law, it is permanent, its jurisdiction is compulsory, its procedure is *inter partes*, it applies rules of law and it is independent.
- 30 As regards, more specifically, the requirement of independence, the Fifth Appeal Chamber states that, in accordance with Paragraph 271(1) of the BAO, appeal chamber members are not bound by any directions in the exercise of their functions.
- 31 According to the Austrian Government, the independence of a body such as an appeal chamber does not follow exclusively from the absence of any obligation to follow directions. It stresses that criticisms have been levelled in Austrian academic writings against the dual role of the President of the regional finance authority who, on the one hand, is the head of that tax authority and, on the other, influences the membership of the appeal chambers, and against the hybrid

role of the regional finance authority official who is also a member of the appeal chamber, an official who, on the one hand, is bound by directions in his department and, on the other, is not bound by any directions as a member of the appeal chamber.

- 32 The Austrian Government submits that those objections can be disregarded in view of the practice which, as regards the two appeal chamber members who belong to the tax authority, ensures that there is a separation of functions between the appeal chamber, which is required to rule on complaints against decisions taken by the regional finance authority, and the departments of that authority whose decisions are challenged. Thus, in fact, the President of a regional finance authority does not himself assume the presidency of the appeal chamber and nominates a finance official to exercise that function. Moreover, the second member of the appeal chamber who comes from the tax authority intervenes, in his capacity as an appeal chamber member, only outside the fields and procedures for which he is usually responsible in his capacity as a tax official.
- 33 The Commission states that, as bodies of the appellate tax authority (Paragraph 260(2) of the BAO), the appeal chambers are an integral part of that authority, at least from the organisational point of view. It submits, however, that there are various factors which are such as to ensure the independence of the appeal chambers from that administrative authority: first, the composition of the appeal chambers, the majority of whose members do not come from the tax authority but are delegated by the professional bodies (Paragraph 270(3) of the BAO); second, the express guarantee of the lack of any direction given to the members of the appeal chambers (Paragraph 271(1) of the BAO) and the obligation, for those members, to withdraw where there is a well-founded suspicion of partiality (Paragraph 283 of the BAO), and, finally, the option for the President of the regional finance authority to bring before the Administrative Court an appeal against the decision of the appeal chamber (Paragraph 292 of the BAO), which shows that the appeal chambers can adopt a decision against the tax authority.

Findings of the Court

- 34 According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the 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, in particular, *Dorsch Consult*, paragraph 23, and the case-law there cited, and Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33).
- 35 It is unnecessary to determine whether the appeal chambers satisfy the other conditions for them to be categorised as courts or tribunals for the purposes of Article 234 EC, since it does not appear that the criterion of independence is fulfilled.
- 36 It must be remembered that the expression ‘court or tribunal’ within the meaning of Article 234 EC can mean only an authority acting as a third party in relation to the authority which adopted the contested decision (Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15).
- 37 The authority before which an appeal can be brought against a decision adopted by a department of an administrative authority cannot be regarded as a third party in relation to that department and, accordingly, as a court or tribunal within the meaning of Article 234 EC, where it has an organisational link with that administrative authority (see, to that effect, *Corbiau*, paragraph 16). This will be so unless the national legal framework is such as to ensure a separation of functions between, on the one hand, the department of the administrative authority whose decision is being challenged and, on the other, the authority which rules on complaints lodged against decisions of that department without

receiving any directions from the administrative authority to which that department is responsible (see, to that effect, *Gabalfrisa and Others*, paragraph 39).

- 38 Where there is an organisational and functional link between an appeal chamber and the regional finance authority which adopts the decisions contested before it, it is impossible to regard the chamber as a third party in relation to that administrative authority.
- 39 As regards, first, the existence of an organisational link, it is not disputed that two of the five members of the appeal chamber belong to the tax authority. It is noteworthy, in that regard, that at least according to the terms of the legislation the President of the regional finance authority is a member as of right of the appeal chamber, of which he exercises the function of president.
- 40 As regards, second, the existence of a functional link, it should be noted, first of all, that the official of the regional finance authority who is the second member of the appeal chamber drawn from the tax authority continues, in addition, to pursue his activities within that authority and is, in that capacity, subject to the directions of his hierarchical superiors.
- 41 Next, under Paragraph 270(1) of the BAO, the President of the regional finance authority has the power to nominate members of the appeal chambers on the basis of the lists of appeal commission members. There is no legislative provision to prevent him from modifying, at his discretion, the composition of an appeal chamber for the inquiry into each complaint, or even in the course of the inquiry into a complaint. In the absence of an express legislative provision determining the length of the mandate of appeal chamber members and specifying the conditions of removal, members cannot be said to enjoy sufficient safeguards against undue intervention or pressure on the part of the executive (see, to that effect, Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraph 21).

- 42 Finally, and above all, the President of the regional finance authority may — and here he is subject to possible directions from the Finance Minister — bring an appeal against a decision of an appeal chamber (Paragraph 292 of the BAO) and on that occasion defend a point of view different from that adopted by the chamber of which he is president.
- 43 In those circumstances, the prohibition in Paragraph 271(1) of the BAO against receiving directions in the exercise of the functions of an appeal chamber member, the fact that, in practice, the President of the regional finance authority does not himself, as, in law, he may, assume the presidency of the appeal chamber and nominates for that purpose another member of the tax authority, and the fact that the second member of the chamber belonging to the tax authority does not intervene on the questions and procedures with which he is usually involved within that administrative authority do not suffice to guarantee the independence of an appeal chamber.
- 44 It is clear from the foregoing that an appeal chamber does not constitute a court or tribunal within the meaning of Article 234 EC and that, as a consequence, the Court has no jurisdiction to answer the questions referred by the Fifth Appeal Chamber.

Costs

- 45 The costs incurred by the Austrian and French 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 Fifth Appeal Chamber, the decision on costs is a matter for that chamber.

On those grounds,

THE COURT (Fifth Chamber)

hereby rules:

The Court of Justice of the European Communities has no jurisdiction to answer the questions referred by the Berufungssenat V der Finanzlandesdirektion für Wien, Niederösterreich und Burgenland, by order of 2 December 1999.

Jann

von Bahr

Edward

Wathelet

Timmermans

Delivered in open court in Luxembourg on 30 May 2002.

R. Grass

P. Jann

Registrar

President of the Fifth Chamber