ORDER OF THE COURT (Fourth Chamber)

10 May 2007 *

In Case C-492/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Baden-Württemberg (Germany), made by decision of 14 October 2004, received at the Court on 1 December 2004, in the proceedings

Lasertec Gesellschaft für Stanzformen mbH

v

Finanzamt Emmendingen,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász, R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: R. Grass,

the Court, proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Articles 56 to 58 EC.

2 The reference was made in the course of proceedings arising from a decision by which the Finanzamt Emmendingen (Tax Office, Emmendingen, 'the Finanzamt'), for the purpose of determining the tax owed by Lasertec Gesellschaft für Stanzformen mbH ('the applicant'), a company governed by German law, reclassified the interest paid by the applicant to its Swiss shareholder, Lasertec AG ('Lasertec'), as a covert distribution of profits.

National law

3 Paragraph 8a of the Law on corporation tax (Körperschaftsteuergesetz, 'the KStG'), 'Capital borrowed from shareholders', was inserted by the Law on measures to prevent the relocation of enterprises (Standortsicherungsgesetz) of 13 September 1993 (BGBl. 1993 I, p. 1569). According to the order for reference, that law entered into force on 14 September 1993.

4 In the version applicable at the material time, Paragraph 8a of the KStG contained the following provisions:

'(1) Repayments in respect of loan capital which a company limited by shares subject to unlimited taxation has obtained from a shareholder not entitled to corporation tax credit which had a substantial holding in its share or nominal capital at any point in the financial year shall be regarded as a covert distribution of profits,

...

2. where repayment calculated as a fraction of the capital is agreed and the loan capital is more than three times the shareholder's proportional equity capital at any point in the financial year, save where the company limited by shares could have obtained the loan capital from a third party under otherwise similar circumstances or the loan capital constitutes borrowing to finance normal banking transactions. ...

(2) The shareholder's proportional equity capital is the proportion of the equity capital of the company limited by shares at the end of the previous financial year which corresponds to the shareholder's share of the subscribed capital. The equity capital is defined as the subscribed capital less the outstanding capital contributions ...

(3) A significant holding exists where the shareholder holds directly or indirectly — also through a partnership — over one quarter of the share or nominal capital of the company limited by shares. This also applies where the shareholder holds over one quarter thereof with other shareholders with whom he forms an association or by whom he is controlled, whom he controls, or, who, together with him, are controlled. A shareholder with no significant holding shall be treated in the same way as a shareholder with a significant holding where he exercises, either independently or in collaboration with other shareholders, a controlling influence over the company limited by shares.'

5 It is apparent from the order for reference that, generally, inter alia, non-resident shareholders are not entitled to a tax credit.

6 Under Paragraph 54(6a) of the KStG, Article 8a of the KStG has been applicable from the financial year subsequent to 31 December 1993.

The dispute in the main proceedings and the reference for a preliminary ruling

7 The applicant is a company governed by German law which was founded by a constituent agreement of 12 September 1994. It has unlimited liability to tax in Germany.

8 At the material time, the applicant's nominal capital of DEM 300 000 was held by Mr Papke in the amount of DEM 100 000 and by Lasertec in the amount of DEM 200 000.

9 Under a provision of the applicant's constituent agreement, one quarter of the initial capital contributions were payable immediately while the outstanding amount was payable on demand by the management.

10 By contract of 5 January 1995, Lasertec granted the applicant a loan of DEM 700 000. The initial period of the contract was fixed at two years. The loan and the interest relating thereto was to be repaid in quarterly instalments of DEM 34 000. The interest charges relating to that loan amounted, in 1995, to DEM 48 132.64.

11 In an audit carried out in August 1997 and relating to the financial year 1995, the tax auditor ascertained that the outstanding amount of the subscribed capital had been paid only on 10 January 1995. In her view, it was thus necessary to deduct from the amount of the subscribed capital (DEM 300 000) the amount of the contribution unpaid as at 31 December 1994 (DEM 225 000). The auditor therefore took the view that the share held by Lasertec in the applicant's equity capital had amounted, at that time, to DEM 50 000. As the loan granted by Lasertec to the applicant had to be classified as 'external capital', the auditor, under Paragraph 8a of the KStG, deducted from the amount of that loan (DEM 700 000) three times the share held by Lasertec in the applicant's equity capital (DEM 150 000). The proportion of the interest charges for the year 1995 corresponding to the outstanding amount of DEM 550 000, namely DEM 37 818, was, for the purposes of establishing the applicant's tax liability for the financial year concerned, classified as a 'covert distribution of profits'.

12 The Finanzamt, by an assessment dated 15 June 1998, found that, under Article 8a of the KStG, the interest charges at issue were to be reclassified as a covert

distribution of profits and taxed as such. Consequently, it adjusted the tax payable by the applicant for the financial year 1995 to DEM 16 207.

13 On 2 July 1998, the applicant lodged an objection against that assessment, which was rejected by a decision of the Finanzamt of 22 February 1999. It challenged that decision by an application lodged before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) on 22 March 1999.

14 In those circumstances, the Finanzgericht Baden-Württemberg decided to stay the proceedings and to refer the following two questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 57(1) EC to be interpreted as meaning that the restrictions of the movement of capital to or from third countries which "exist" on 31 December 1993 are those for which the legislative process has already been completed by the national legislature on that date, or those which under the national legislation are already applicable on that date to existing factual situations?

(2) Is Article 56(1) EC in conjunction with Article 58 EC to be interpreted as meaning that the — partial — taxation as a distribution of profits of payments of interest by a capital company resident in a Member State to a loan provider in a third country who is at the same time a shareholder in the capital company is thereby prohibited because this is arbitrary discrimination or a disguised restriction of the free movement of capital between a Member State and a third country?'

The questions referred for a preliminary ruling

15 Under Article 104(3), first subparagraph, of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may give its decision by reasoned order.

16 By its questions, the national court is essentially asking whether national rules in accordance with which the loan interest paid by a resident capital company to a shareholder established in a non-member country who has a substantial holding in the capital of that company is, under certain conditions, regarded as a covert distribution of profits which is taxable in the hands of the resident borrowing company are compatible with the provisions of the EC Treaty relating to the free movement of capital.

17 The French Government and the Commission of the European Communities submit that the national provision at issue in the main proceedings can be examined only on the basis of freedom of establishment and not on the basis of the free movement of capital. They claim, in essence, that that provision relates only to substantial holdings, capable of conferring a determinative influence in respect of the company in which the holding is held, and that, consequently, it falls entirely within the material scope of freedom of establishment.

18 It is therefore for the Court to ascertain on the basis of which freedom that provision is to be analysed.

19 In that regard, it is apparent from settled case-law that in order to ascertain whether national legislation falls within one or the other of the freedoms of movement, the purpose of the legislation at issue must be taken into consideration (see, to that

effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 31 to 33; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 34 and 44 to 49; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraphs 37 and 38; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 26 to 34).

20 Thus, national provisions relating to holdings giving the holder a definite influence on the decisions of the company concerned and allowing him to determine its activities come within the material scope of the Treaty provisions on freedom of establishment (see, to that effect, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 31; and *Test Claimants in the Thin Cap Group Litigation*, paragraph 27).

21 In the case in the main proceedings, the national measure at issue applies to circumstances in which the non-resident lending company has a substantial holding in the nominal capital of the resident borrowing company, namely a holding of over 25%.

22 The treatment of a lesser holding which nevertheless confers a dominant influence over the company concerned as such a holding shows, as stated by the Commission in its written observations, that, for the German legislature, the national measure at issue in the main proceedings is designed to apply, irrespective of a precise threshold, to holdings giving the holder a definite influence on the decisions of the company concerned and allowing him to determine its activities, in accordance with the case-law noted in paragraph 20 above (see, by analogy, *Test Claimants in the Thin Cap Group Litigation*, paragraph 28).

23 Furthermore, it is apparent from the order for reference that Lasertec, the lending company, holds two thirds of the nominal capital in the applicant, the borrowing company. Such a holding unquestionably confers on Lasertec a determinative influence on the applicant's decisions and activities (see, by analogy, *Test Claimants in the Thin Cap Group Litigation*, paragraph 32).

24 It follows that this case falls within the material scope solely of the Treaty provisions relating to freedom of establishment.

25 If, as submitted by the applicant, it were to be accepted that the national measure at issue in the main proceedings has restrictive effects on the free movement of capital, such effects must be seen as an unavoidable consequence of the restriction on freedom of establishment as found by the Court in Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779 and do not justify an examination of that measure in the light of Articles 56 EC to 58 EC (see, to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 33; *Fidium Finanz*, paragraphs 48 and 49; and *Test Claimants in the Thin Cap Group Litigation*, paragraph 34).

26 Consequently, there is no need to answer the questions referred in the light of the Treaty provisions relating to the free movement of capital.

27 As for the chapter of the Treaty relating to freedom of establishment, it does not include any provision which extends the scope of its provisions to situations involving nationals of non-member countries who are established outside the European Union. As the Court has stated in Opinion 1/94 of 15 November 1994 (ECR I-5267, paragraph 81), the objective of that chapter is to secure freedom of establishment for nationals of Member States. Therefore, Article 43 EC et seq. cannot be relied on in a situation where a company in a non-member country has a shareholding which confers on it a determinative influence on the decisions and the activities of a company in a Member State (see, by analogy, as regards the freedom to provide services, *Fidium Finanz*, paragraph 25).

28 In the light of the foregoing, the answer to the questions referred must be that a national measure in accordance with which the loan interest paid by a resident capital company to a non-resident shareholder who has a substantial holding in the capital of that company is, under certain conditions, regarded as a covert distribution of profits, taxable in the hands of the resident borrowing company, primarily affects freedom of establishment within the meaning of Article 43 EC et seq. Those provisions cannot be relied on in a situation involving a company in a non-member country.

Costs

29 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 (Fourth Chamber) hereby rules:

A national measure in accordance with which the loan interest paid by a resident capital company to a non-resident shareholder who has a substantial holding in the capital of that company is, under certain conditions, regarded as a covert distribution of profits, taxable in the hands of the resident borrowing company, primarily affects freedom of establishment within the meaning of Article 43 EC et seq. Those provisions cannot be relied on in a situation involving a company in a non-member country.

[Signatures]