JUDGMENT OF THE COURT (Fourth Chamber)

24 May 2007 *

In Case C-157/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Verwaltungsgerichtshof (Austria), made by decision of 28 January 2005, received at the Court on 7 April 2005, in the proceedings

Winfried L. Holböck

v

Finanzamt Salzburg-Land,

THE COURT (Fourth Chamber),

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

* Language of the case: German.

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

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Holböck, by W.-D. Arnold, Rechtsanwalt,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the French Government, by G. de Bergues and C. Jurgensen, acting as Agents,

— the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

— the United Kingdom Government, by M. Bethell, acting as Agent, and T. Ward, Barrister,

— the Commission of the European Communities, by R. Lyal and G. Braun, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

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

2 The reference was made in the course of proceedings between Mr Holböck and Finanzamt Salzburg-Land (Salzburg-Land Tax Office) regarding the taxation of dividends which Mr Holböck received from a company established in a non-member country.

Legal context

3 Prior to its amendment by the Tax Reform Law of 1993 (Steuerreformgesetz 1993, *Bundesgesetzblatt* (Federal Law Gazette) No 818/1993), Paragraph 37(1) and (4) of the Austrian Income Tax Law of 1988 (Einkommensteuergesetz 1988, *Bundesgesetzblatt* No 400/1988; 'EStG 1988') provided:

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

— revenue from general profit distributions (subparagraph 4) ... to half of the average tax rate applicable to the aggregate income;

...

(4) Revenue from shareholdings shall mean:

1. General distributions of dividends by domestic limited companies or trade and industrial cooperatives from shares in companies or cooperatives

...'

4 After amendment by the 1993 Tax Reform Law, the provisions cited above were worded as follows:

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

3. 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 trade and industrial cooperatives in the form of shares in companies or cooperatives ...

...'

5 According to Austrian income tax legislation ('the Austrian legislation'), profit distributions by domestic companies which are made to a natural person resident in Austria are taxed at the reduced 'half-tax rate' ('Hälftesteuersatz').

6 By contrast, profit distributions by foreign limited-liability companies which are made to a natural person resident in Austria are subject to ordinary income tax.

7 As regards the taxation of general profit distributions, neither the 1993 Tax Reform Law nor the Structural Adjustment Law of 1996 (Strukturanpassungsgesetz, *Bundesgesetzblatt* No 201/1996) altered the legal position in respect of the period after 31 December 1993.

Main proceedings and question referred for a preliminary ruling

8 Mr Holböck is resident in Austria, which is also where his centre of interests lies. He is the manager of CBS Conmeth Business Systems GmbH. Its registered office is in Austria and it trades in cosmetic products.

9 The sole shareholder of that company is CBS Conmeth Business Systems AG ('the AG'). Its registered office is in Switzerland. Mr Holböck holds two thirds of the share capital in the AG.

10 By virtue of the shares which he holds in the AG, Mr Holböck received dividends during the period from 1992 to 1996. As income from capital, those dividends are taxable in Austria at the full income tax rate.

11 As there appeared to be some doubt as to whether payment of that tax would be forthcoming, the Finanzlandesdirektion für Salzburg (Regional Finance Directorate for Salzburg) — later replaced by the Finanzamt Salzburg-Land — ordered, by decision of 3 July 2000, that the tax owed in respect of Mr Holböck's income during the period from 1992 to 1996 be secured on his assets to a total of ATS 118 944 088. Mr Holböck lodged an appeal against that decision before the Verwaltungsgerichtshof (Higher Administrative Court).

12 In his appeal, Mr Holböck claims that the cross-border payment of dividends from a company in Switzerland to an Austrian shareholder falls within the scope of Article

56 EC, which prohibits all restrictions on the movement of capital, including such movements between Member States and non-member countries. The fact that, under the Austrian legislation, dividends distributed to natural persons by companies which are established in Austria are subject to tax at a rate of half the average rate, while foreign dividends are subject to full taxation, constitutes unequal treatment for which there is no justification.

13 The national court states that when the Court of Justice ruled on Austrian taxation rules on revenue from capital in Case C-315/02 *Lenz* [2004] ECR I-7063, it confined itself to revenue from capital from other Member States.

14 In referring to Article 57(1) EC, according to which the provisions of Article 56 EC are without prejudice to the application to non-member countries of any restrictions which existed on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from non-member countries involving direct investment, the national court expresses the view that the meaning of 'direct investment' has not been sufficiently clarified.

15 It is against that background that the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the provisions relating to the free movement of capital (Article 56 et seq. EC) preclude national legislation in force on 31 December 1993 (and remaining in force after Austria's accession to the [European Union] on 1 January 1995), according to which dividends from domestic shares are taxed at a rate of half the average tax rate applicable to the aggregate income, whereas dividends from a public limited company established in a non-member country (in the main proceedings, Switzerland), in which the taxable person holds two thirds of the shares, are invariably taxed at the ordinary rate of income tax?'

The question referred

16 By its question, the referring court asks essentially whether the provisions of the EC Treaty relating to the free movement of capital preclude legislation of a Member State under which dividends distributed by a company that is established in a non-member country, in which the taxpayer holds two thirds of the share capital, are taxed at the ordinary rate of income tax, whereas a shareholder receiving dividends from a resident company is taxed at a rate of half the average tax rate.

17 Referring to the judgment in *Lenz*, Mr Holböck and the Commission of the European Communities claim that the Austrian legislation constitutes a restriction on the free movement of capital.

18 Unlike Mr Holböck, however, the Commission considers that the receipt of dividends distributed by a company that is established in a non-member country, and in which the recipient shareholder holds two thirds of the share capital, falls within the meaning of 'direct investment' for the purposes of Article 57(1) EC. Since the legislation in question existed on 31 December 1993, it is caught by the exception in Article 57(1) EC to the prohibition of restrictions on the movement of capital between Member States and non-member countries that is laid down in Article 56 EC.

19 By contrast, the French and Netherlands Governments claim, principally, that the Austrian legislation can be considered only in terms of the rules regarding freedom of establishment, not of those regarding the free movement of capital. However, as that freedom does not extend to the establishment of a Member State national in a non-member country, Mr Holböck is not entitled to rely on the freedom of establishment in order to challenge the application of that legislation to dividends which he received from a company established in Switzerland in which he holds two thirds of the share capital.

20 Should it be necessary to consider the Austrian legislation in terms of the free movement of capital, the French and Netherlands Governments, and also the United Kingdom Government, take the same line as the Commission, according to which such legislation is, in any event, caught by the exception provided for in Article 57(1) EC.

21 As a preliminary point, it should be observed that, according to settled case-law, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; *Lenz*, paragraph 19; and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19).

22 As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well established case-law that the purpose of the legislation concerned 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 11753, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 26 to 34).

23 Unlike the situations in *Cadbury Schweppes and Cadbury Schweppes Overseas* (paragraphs 31 and 32) and *Test Claimants in the Thin Cap Group Litigation* (paragraphs 28 to 33), the Austrian legislation in the present case is not intended to apply only to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities.

24 National legislation which makes the receipt of dividends liable to tax, where the rate depends on whether the source of those dividends is national or otherwise, irrespective of the extent of the holding which the shareholder has in the company making the distribution, may fall within the scope of both Article 43 EC on freedom of establishment and Article 56 EC on free movement of capital (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, paragraphs 37 and 38, and *Test Claimants in the FII Group Litigation*, paragraphs 36, 80 and 142).

25 However, in the present case, neither of those freedoms precludes the application of the Austrian legislation.

26 First, as regards the provisions of the Treaty concerning freedom of establishment, it should be noted that Article 43 EC secures freedom of establishment for nationals of a Member State on the territory of another Member State, which includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the State of establishment (see Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 27, and Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 40).

27 According to equally well established case-law of the Court, even though, according to their wording, the provisions of the Treaty concerning freedom of establishment

are directed to 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 (see Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 31, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 42).

28 However, the chapter of the Treaty concerning the right of establishment does not include any provision extending its application to situations which involve the establishment in a non-member country of a Member State national or of a company incorporated under the legislation of a Member State (see, to that effect, the order of 10 May 2007 in Case C-102/05 *A and B* [2007] ECR I-3871, paragraph 29).

29 Therefore, the provisions of that chapter cannot be invoked in circumstances such as those at issue in the main proceedings.

30 Second, as regards the provisions of the Treaty concerning the free movement of capital, it is true that the Court has, in paragraphs 20 to 22 of its judgment in *Lenz*, held that, in so far as the taxation of income from capital at a definitive tax rate of 25% or at a rate reduced by half is subject, under the national legislation, to a condition that the source of that income is in Austria, the legislation not only has the effect of deterring taxpayers living in Austria from investing their capital in companies established outside that Member State, but also produces a restrictive effect in relation to those companies, inasmuch as it constitutes an obstacle to their raising capital within Austria. According to the Court, such legislation constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 56(1) EC.

31 However, even if a Member State national who holds two thirds of the share capital of a company established in a non-member country were justified in invoking the prohibition of restrictions on the movement of capital between Member States and non-member countries set out in Article 56(1) EC in challenging the application of that legislation to dividends which he has received from such a company, in the present case, as the French, Netherlands and United Kingdom Governments, and also the Commission, have noted, that legislation is caught by the exception laid down in Article 57(1) EC.

32 It is clear from Article 57(1) EC that Article 56 EC is without prejudice to the application to non-member countries of any restrictions which existed on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from non-member countries involving direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets.

33 Although the concept of 'direct investment' is not defined by the Treaty, it has nevertheless been defined in the nomenclature of the capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) (*Test Claimants in the FII Group Litigation*, paragraphs 177 and 178).

34 As the list of 'direct investments' in the first section of that nomenclature and the relative explanatory notes show, the concept of direct investments concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraphs 180 and 181).

35 As regards shareholdings in new or existing undertakings, as the explanatory notes confirm, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or in some other way, to participate effectively in the management of that company or in its control (*Test Claimants in the FII Group Litigation*, paragraph 182).

36 Contrary to Mr Holböck's contention, the restrictions on capital movements involving direct investment or establishment within the meaning of Article 57(1) EC extend not only to national measures which, in their application to capital movements to or from non-member countries, restrict investment or establishment, but also to those measures which restrict payments of dividends deriving from them (see *Test Claimants in the FII Group Litigation*, paragraph 183).

37 It follows that a restriction on capital movements, such as a less favourable tax treatment of foreign-sourced dividends, comes within the scope of Article 57(1) EC, inasmuch as it relates to holdings acquired with a view to establishing or maintaining lasting and direct economic links between the shareholder and the company concerned and which allow the shareholder to participate effectively in the management of the company or in its control (*Test Claimants in the FII Group Litigation*, paragraph 185).

38 As the French and Netherlands Governments and the Commission have noted, that is true of the less favourable tax treatment of foreign-sourced dividends associated with a shareholding of two thirds of the shares of the company making the distribution.

39 However, it is clear from Article 57(1) EC that a Member State may, in its relations with non-member countries, apply restrictions on capital movements which come within the substantive scope of that provision, even though they contravene the principle of the free movement of capital laid down under Article 56 EC, provided that those restrictions already existed on 31 December 1993 (*Test Claimants in the FII Group Litigation*, paragraph 187).

40 While it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by a Community measure, the Court can provide guidance on interpreting the Community concept which constitutes the basis of a derogation from Community rules for national legislation 'existing' on a particular date (see, to that effect, Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 27, and *Test Claimants in the FII Group Litigation*, paragraph 191).

41 In that context, the Court has held that any national measure adopted after a date thus fixed is not, by that fact alone, automatically excluded from the derogation laid down in the Community measure in question. A provision which is, in substance, identical to the previous legislation, or limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, will be covered by the derogation. By contrast, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the date fixed in the Community measure in question (see *Konle*, paragraphs 52 and 53, and *Test Claimants in the FII Group Litigation*, paragraph 192).

42 In the present case, the national court has stated in its order for reference that the taxation system applicable in Austria at the time of the facts in the main proceedings

to dividends distributed by companies established in non-member countries was based on the EStG 1988, as amended by the 1993 Tax Reform Law and the 1996 Structural Adjustment Law. It is apparent also from the order for reference that, in relation to the taxation of general profit distributions, unlike the provisions introduced by the EStG 1988 before 31 December 1993, the amendments to the legislation made after 31 December 1993 did not change the legal framework applicable to the facts in the main proceedings, including in respect of the period after that date.

43 Accordingly, the Austrian legislation must be regarded as having existed on 31 December 1993 for the purposes of Article 57(1) EC.

44 It follows that, even if a taxpayer in Mr Holböck's position is justified in invoking Article 56 EC, that does not preclude the application of the Austrian legislation in circumstances such as those of the main proceedings.

45 In the light of the foregoing, the answer to the question referred must be that Article 57(1) EC must be interpreted as meaning that Article 56 EC is without prejudice to the application by a Member State of legislation which existed on 31 December 1993 under which a shareholder in receipt of dividends from a company established in a non-member country, who holds two thirds of the share capital in that company, is taxed at the ordinary rate of income tax, whereas a shareholder in receipt of dividends from a resident company is taxed at a rate of half the average tax rate.

Costs

46 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:

Article 57(1) EC must be interpreted as meaning that Article 56 EC is without prejudice to the application by a Member State of legislation which existed on 31 December 1993 under which a shareholder in receipt of dividends from a company established in a non-member country, who holds two thirds of the share capital in that company, is taxed at the ordinary rate of income tax, whereas a shareholder in receipt of dividends from a resident company is taxed at a rate of half the average tax rate.

[Signatures]