JUDGMENT OF THE COURT (Second Chamber)

2 October 2008 (*)

(Freedom of establishment – Tax legislation – Corporation tax – Valuation of unlisted shares in limited companies)

In Case C-360/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Finanzgericht Hamburg (Germany) made by decision of 11 August 2006, received at the Court on 5 September 2006, in the proceedings

Heinrich Bauer Verlag BeteiligungsGmbH

v

Finanzamt für Großunternehmen in Hamburg,

intervener:

Heinrich Bauer Verlag KG,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen (Rapporteur), J. Makarczyk, J.-C. Bonichot and C. Toader, Judges,

Advocate General: V. Trstenjak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2007,

after considering the observations submitted on behalf of:

– Heinrich Bauer Verlag BeteiligungsGmbH, by R. Scheidmann, Steuerberater, and by K. Eicker and R. Obser, Rechtsanwälte,

– the Finanzamt für Großunternehmen in Hamburg, by M. Fromm, acting as Agent,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 52 of the EEC Treaty (subsequently Article 52 of the EC Treaty and now, after amendment, Article 43 EC) and Article 58 of the EEC Treaty (subsequently Article 58 of the EC Treaty and now, after amendment, Article 48 EC).

2 The reference has been made in proceedings where Heinrich Bauer Verlag BeteiligungsGmbH ('HBV') and the Finanzamt für Großunternehmen in Hamburg ('the Finanzamt') are in dispute in respect of the valuation of financial interests of HBV, which has holdings in two companies or firms established abroad, for the purposes of determining the wealth tax liability of Heinrich Bauer Verlag KG ('HB'), the parent company of HBV, for the tax year 1988.

Legal context

3 It is clear from the order for reference that, under German law, when valuing the financial interests of unlisted companies for the determination of wealth tax, the holdings of those companies in foreign partnerships are valued at market value, whereas the valuation of their holdings in national partnerships is based solely on their net asset value. If the market value cannot be estimated by reference to a sale carried out in the 12 months preceding the valuation, it is determined on the basis of the net asset value and the prospective earnings of the firm concerned.

The main proceedings and the question referred for a preliminary ruling

4 HBV is an unlisted company which has its registered office in Germany. All of its shares are held by its parent company, HB.

5 HBV has holdings in foreign limited partnerships: namely, the Spanish firm Bauer Ediciones Sociedad en Comandita Madrid ('HBE'), formed in 1986, and the Austrian firm Basar Zeitungs-und Verlagsgesellschaft mbH und Co. KG Wien ('WBC'), of which all the shares were acquired by HBV in 1988.

6 It was necessary to assess the value of HBV's holdings in order to establish, for the 1988 tax year, the amount of HB's wealth tax liability.

7 For that assessment, the Finanzamt took account not only of the net asset value, or intrinsic value, of HBE and WBC, but also of their prospective earnings.

8 HBV brought an action against the Finanzamt's decision before the Finanzgericht Hamburg (Finance Court, Hamburg), claiming that only the net asset value of the firms should have been taken into consideration. In addition, it is inconsistent for the valuation of national partnerships to be based exclusively on their net asset value, while not only the assets of foreign partnerships but also their prospective earnings, those two factors taken together corresponding to their fair or current market value, are taken into account.

9 As regards HBV's holding in HBE, the Finanzgericht Hamburg states that the variable method of valuing a holding in a company or firm according to whether the company or firm is national or foreign leads to different valuations which have a direct impact on the amount of wealth tax liability.

Accordingly, the fact that a holding held abroad is attributed a higher value than that of a holding held in a national entity appears to engender a restriction on the freedom of establishment.

10 In the opinion of the referring court, such a restriction would be permissible only if it pursued a legitimate objective compatible with the EEC Treaty. However, that court is unable to identify any such objective capable of justifying the unequal treatment described.

11 In relation to HBV's holding in WBC, it cannot be held that the principle of freedom of establishment under the first paragraph of Article 52 of the Treaty was infringed in 1988, since the Republic of Austria has been a member of the European Union only since 1 January 1995. The same is true as regards the Agreement on the European Economic Area (OJ 1994 L 1, p. 3, 'the EEA Agreement') to which that State was a party, which was signed on 2 May 1992 but which has been in force only since 1 January 1994.

12 Moreover, no breach of the principle of the free movement of capital can have arisen, since the provisions which were in force at the material time did not preclude a holding in a national partnership being valued differently from a holding in a partnership established in another Member State or in a non-member State.

13 In those circumstances, the Finanzgericht Hamburg decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it incompatible with Article 52 in conjunction with Article 58 of the Treaty … that, when unlisted shares in a company are valued, an interest in a national partnership is assigned a lower value than an interest in a partnership established in another Member State?'

Preliminary observations

14 The Finanzamt states in its observations that the referring court misjudges the extent to which the German system of valuing the financial interests of unlisted companies affects compliance with the fundamental freedoms of the Treaty. There is in fact no discrimination, either direct or indirect, because, from a fiscal point of view, earnings factors are taken into account both for national holdings and for foreign holdings.

15 It must be noted that it is not for the Court of Justice to rule on the interpretation of provisions of national law, but that it is the task of the Court to take account, under the division of jurisdiction between the Community courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set (see Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35).

16 The question referred must therefore be examined in the factual and legislative context described by the Finanzgericht Hamburg in the order for reference.

The question referred for a preliminary ruling

17 First, although direct taxation falls within their competence, Member States must nonetheless exercise that competence consistently with Community law and avoid any discrimination on grounds of

nationality (see, inter alia, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 17, and Case C-105/07 *Lammers & Van Cleef* [2008] ECR I-0000, paragraph 12).

18 As regards HBV's holding in WBC, the German Government and the Commission of the European Communities claim that, in relation to the 1988 tax year, it was not possible to invoke fundamental freedoms since the Republic of Austria was not then a member of the European Community and the EEA Agreement had not then been signed.

19 In respect of HBV's holding in HBE, the German Government submits that, in the present case, the principle of freedom of establishment is irrelevant, since HBV's investments in Spain should not be seen as the exercise of that freedom, but rather as being a pure investment of capital in the context of the free movement of capital.

20 In the opinion of the German Government, HBV's holding in HBE, which it holds as a limited partner, does not give the former a definite influence on the activities of the Spanish company. On the contrary, HBV is excluded from the decision-making process and has no right to hold itself out as representing HBE as regards third parties. Freedom of establishment can only be at issue where nationals of the Member State concerned have holdings in a company or firm established in another Member State which give them a definite influence on the decisions of that company or firm and allow them to determine its activities.

21 As regards HBV's holding in WBC, it is necessary to consider whether the provisions of the Treaty on freedom of establishment, and in particular Articles 52 and 58 of the Treaty, are applicable to such a situation.

22 It must be remembered, as pointed out by the German Government, the Commission and the Advocate General in point 49 of her Opinion, that, first, the Republic of Austria has been a member of the Community only since 1 January 1995 and, secondly, the EEA Agreement did not enter into force until 1 January 1994.

23 It follows that neither the principle of freedom of establishment under Articles 52 and 58 of the Treaty nor the corresponding provisions of Article 31 of the EEA Agreement were applicable to the valuation of HBV's holding in WBC.

24 In relation to HBV's holding in HBE, it is again necessary to consider whether Articles 52 and 58 of the Treaty are applicable to such a situation.

25 According to settled case-law, the freedom of establishment which Article 52 of the Treaty grants to nationals of the Member States and which entails the right for them to take up and pursue activities as self-employed persons under the same conditions laid down for its own nationals by the law of the Member State where such establishment is effected, includes, pursuant to Article 58 of the Treaty, the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their corporate seat in the above sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons (see, inter alia, Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 20).

26 It must also be pointed out that even though, according to their wording, the provisions concerning

freedom of establishment 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 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 (see *AMID*, paragraph 21).

27 In accordance with settled case-law, national provisions which apply to holdings by nationals or companies of the Member State concerned in the capital of a company established in another Member State, giving them definite influence on the company's decisions and allowing them to determine its activities, come within the substantive scope of the provisions of the Treaty on freedom of establishment (see Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraphs 22 and 70, and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 20).

28 It is for the referring court to determine whether that is indeed the case in the main proceedings.

29 It may be helpful to point out that that is the case where a resident company owns 100% of the shares in a company established in another Member State, or, again, where the shares of a company established in another Member State are held, directly or indirectly, by members of one family, residing in another Member State, who pursue the same interests, take decisions by agreement, through the same representative at general meetings of that company, and decide on its activities (see *Rewe Zentralfinanz*, paragraph 23, and Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraphs 13, 14 and 31).

30 To the extent that HBV's holding in HBE brings the former company within the scope of the provisions of the Treaty on freedom of establishment, it must be determined whether Articles 52 and 58 of the Treaty preclude the application of tax legislation in a Member State which, for the purposes of valuing the unlisted shares of a company in circumstances such as those in the main proceedings, causes that company's holding in a partnership established in another Member State to be assigned a greater value than its holding in a partnership established in the Member State concerned.

31 In the present case, the tax position of a company resident in Germany which, like HBV, has a holding in a partnership established in another Member State, such as HBE, is, as the referring court stated, less favourable, in respect of the wealth tax liability of the parent company of that company, than the tax position it would have if that partnership were established in Germany.

32 Consequently, such a difference in treatment gives rise to a tax disadvantage for a company such as HB, the parent company of HBV.

33 In the light of that difference, and the fact that HBV is entirely owned by that parent company, HBV might be discouraged from acquiring a holding in a partnership established in another Member State (see, to that effect, *Rewe Zentralfinanz*, paragraph 31).

34 A restriction on freedom of establishment can be justified only if that provision pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. Even if that were so, it would still have to be of such a nature as to ensure achievement of the aim in question and not go beyond what was necessary for that purpose (see, inter alia, Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 49).

35 The Finanzamt claims that the addition to the net asset value of the company HBE of the value of its

prospective earnings is necessary on grounds of tax cohesion, in order to ensure that comparable factual situations are taxed in the same way. If prospective earnings were not included in the valuation of HBV's holdings, holdings held in foreign companies or firms would be treated more favourably.

36 The German Government submits that, in any event, the legislation in question is justified because of the practical administrative difficulties in calculating the value of holdings in companies or firms established in other Member States.

37 As regards the justification put forward by the Finanzamt, the need to maintain the cohesion of a tax system can indeed justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. However, for an argument based on such reasoning to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, inter alia, *Rewe Zentralfinanz*, paragraph 62, and Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 56).

38 However, as regards the wealth tax at issue in the main proceedings, it has not been shown in what respect there is a direct link between the tax advantage attaching to a holding in a partnership established in the taxing Member State and a corresponding tax levy.

39 Consequently, it must be held that a restriction such as the restriction resulting from the tax legislation in dispute in the main proceedings cannot be justified by the need to ensure the cohesion of the tax system.

40 As regards the argument put forward by the German Government, the Court has held, on several occasions, that the effectiveness of fiscal supervision constitutes an overriding reason of public interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty (see Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 47).

41 Even if Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 1977 L 336, p. 15) were not applicable in the main proceedings, that could not justify the method of calculating the value of holdings in companies or firms established in other Member States being designed in such a way as to be less favourable than the method of calculating the value of holdings in companies or firms established in the Member State concerned. The tax authorities could request the taxpayers concerned to provide themselves the evidence which the authorities consider necessary to carry out a calculation of the value of the holdings of those taxpayers in companies or firms established in other Member States (see, to that effect, Case C-464/05 *Geurts and Votgen* [2007] ECR I-9325, paragraph 28).

42 In the light of the foregoing, the answer to the question referred must be that, in the absence of valid justification, Articles 52 and 58 of the Treaty preclude the application of tax legislation of a Member State which, for the purposes of valuing the unlisted shares of a company in circumstances such as those in the main proceedings, causes that company's holding in a partnership established in another Member State, subject to the condition that such a holding is capable of allowing it a definite influence on the decisions of the partnership established in the other Member State and enabling it to determine its activities, to be assigned a greater value than its holding in a partnership established in the Member State concerned.

43 Having regard to the documents before the court, it should, so far as relevant, be noted that, in any event, Article 67(1) of the EEC Treaty (subsequently Article 67(1) of the EC Treaty, repealed by the

Treaty of Amsterdam) did not have the effect of abolishing restrictions on movements of capital by the end of the transitional period, that being effected by Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), adopted pursuant to Articles 69 and 70(1) of the EEC Treaty (subsequently Articles 69 and 70 of the EC Treaty, repealed by the Treaty of Amsterdam) (see Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraphs 5 and 6). However, in accordance with Article 6(1) of Directive 88/361, that directive had to be transposed into national law by no later than 1 July 1990, namely after the period concerned in the main proceedings.

Costs

44 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 (Second Chamber) hereby rules:

In the absence of valid justification, Articles 52 of the EEC Treaty (subsequently Article 52 of the EC Treaty, and now, after amendment, Article 43 EC) and 58 of the EEC Treaty (subsequently Article 58 of the EC Treaty, and now Article 48 EC) preclude the application of tax legislation of a Member State which, for the purposes of valuing the unlisted shares of a company in circumstances such as those in the main proceedings, causes that company's holding in a partnership established in another Member State, subject to the condition that such a holding is capable of allowing it a definite influence on the decisions of the partnership established in the other Member State and enabling it to determine its activities, to be assigned a greater value than its holding in a partnership established in the Member State concerned.

[Signatures]

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* Language of the case: German.