JUDGMENT OF THE COURT (Third Chamber)

4 December 2008 (*)

(Freedom to provide services – Freedom of establishment − Tax legislation − Investment premium − National legislation conferring a tax advantage only on assets used in a domestic place of business − Exclusion of assets hired out for remuneration primarily used in other Member States − Leasing of vehicles − Prevention of abuse)

In Case C-330/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Unabhängiger Finanzsenat, Außenstelle Wien (Austria), made by decision of 3 July 2007, received at the Court on 16 July 2007, in the proceedings

Jobra Vermögensverwaltungs-Gesellschaft mbH

v

Finanzamt Amstetten Melk Scheibbs,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues, U. Lõhmus and P. Lindh, Judges,

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 18 September 2008,

after considering the observations submitted on behalf of:

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

– the Austrian Government, by C. Pesendorfer and J. Bauer, acting as Agents,

– the Commission of the European Communities, by W. Mölls and R. Lyal, 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 43 EC and 49 EC.

2 The reference was made in the course of proceedings brought by Jobra Vermögensverwaltungs-Gesellschaft mbH ('Jobra'), a company incorporated under Austrian law, against the Finanzamt Amstetten Melk Scheibbs, regarding the latter's refusal to grant Jobra an investment growth premium ('investment premium') for the lorries that it bought and leased to Braunshofer GmbH ('Braunshofer'), a separate company also incorporated under Austrian law, on the ground that the latter used those lorries primarily in other Member States.

Legal context

3 Paragraph 108e(1) and (2) of the 1988 Income Tax Act (Einkommensteuergesetz, BGBl. 400/1988), as amended in BGBl. I 155/2002 ('the EStG 1988'), provides:

'(1) An investment growth premium of 10% may be claimed for investment growth in respect of assets which are eligible for a premium, provided that the costs of acquisition or manufacture are subject to depreciation for wear and tear (Paragraphs 7 and 8).

(2) Assets which are eligible for a premium shall mean unused tangible assets forming part of the depreciable fixed assets. Assets eligible for a premium shall exclude the following:

...

– Assets which are not used in a domestic place of business that is intended to generate income for the purposes set out in Paragraph 2(3)(1) to (3). In that regard, assets which are hired out for remuneration for use, primarily, abroad are not regarded as being used in a domestic place of business.'

4 Paragraph 24(6) of the 1988 Corporate Tax Act (Körperschaftsteuergesetz, BGBl. 401/1988), as amended in BGBl. I 155/2002, provides:

'The provisions of Paragraphs … 108e and 108f of the EStG 1988 shall apply *mutatis mutandis* to corporations within the meaning of Paragraph 1, in so far as they are not exempt from corporation tax.'

The dispute in the main proceedings and the question referred for a preliminary ruling

5 Jobra, a company established in Austria operating an investment management business, is wholly owned by Josef Braunshofer. Braunshofer is an international transport company which is likewise established in Austria. Jobra owns 100% of the share capital of Braunshofer. In August 2003, Braunshofer set up a branch office in Germany.

6 Jobra owns a fleet of vehicles. It hires its lorries out to Braunshofer under a leasing agreement, for commercial use by the latter. Braunshofer uses those lorries primarily in other Member States in the transport business.

7 In its 2003 corporation tax return, Jobra claimed an investment premium of EUR 46 770 under Paragraph 108e of the EStG 1988, for lorries purchased in the period from April to September 2002. In June 2004, Jobra's tax account was credited with that amount.

8 However, in the context of a tax review of Jobra, the tax authority found that the conditions for the grant of the premium at issue in the main proceedings were not satisfied because Braunshofer, to whom the lorries were leased, used them primarily abroad, by reason of which the lorries could not be

considered to be assets used in a domestic place of business, within the meaning of the legislation at issue in the main proceedings. Consequently, Jobra was refused the said tax advantage.

9 The tax appeal brought by Jobra was dismissed by the Unabhängiger Finanzsenat, Außenstelle Wien, by decision of 2 November 2005. By judgment of 20 April 2006, the Verwaltungsgerichtshof set aside that decision, principally on the ground of procedural errors. In addition, the Verwaltungsgerichtshof expressed doubts as to whether it was compatible with the principle of freedom to provide services within the meaning of Article 49 EC that 'the assets which are eligible for a premium do not include assets which are hired out for remuneration for use, primarily, in other Member States'.

10 The referring court takes the view that the legislation at issue in the main proceedings enshrines in law different treatment depending on where a service is provided and has doubts as to whether that legislation is compatible with Articles 43 EC and 49 EC.

11 Under those circumstances, the Unabhängiger Finanzsenat, Außenstelle Wien, decided to stay proceedings and to refer the following question to the Court of Justice:

'Do the provisions relating to the freedom of establishment (Article 43 EC et seq.) and/or the freedom to provide services (Article 49 EC et seq.) preclude national legislation in force on 31 December 2003 under which the grant to a trader of a tax advantage (investment growth premium) for the acquisition of unused tangible assets is conditional also upon those assets being used exclusively in a domestic place of business, whereas that tax advantage (investment … premium) is not available for the acquisition of unused tangible assets which are used in a foreign place of business, including, therefore, in a place of business that is located elsewhere in the European Union?'

The question referred for a preliminary ruling

Preliminary observations

12 By its question the referring court is essentially asking whether Article 43 EC et seq. and Article 49 EC et seq. must be interpreted as precluding national legislation pursuant to which the grant to companies acquiring tangible assets of an investment premium is conditional upon the goods for which the premium is claimed being used exclusively in a domestic place of business, and which specifies that assets which, when they are hired out for remuneration, are primarily used in other Member States, are not regarded as being used in such a domestic place of business.

13 As regards the national legal context in which the reference for a preliminary ruling is made, the Austrian Government submits that the grant of that premium is not negatively affected by use of the assets for which the investment premium is claimed in other Member States. The legislation at issue in the main proceedings makes enjoyment of that tax advantage conditional on the assets concerned being allocated to a domestic place of business. According to Austrian case-law, it has to be established whether those assets were used from a domestic place of business for at least half the time they have been in use.

14 As regards the factual context, the Austrian Government states that Braunshofer set up a branch office in Germany in August 2003. Given the facts of the case in the main proceedings, this therefore raises the question whether, in respect of the grant of the investment premium, a taxpayer which uses an economic asset primarily from a domestic place of business and a taxpayer which uses such asset primarily from a foreign place of business are in a comparable situation.

15 The referring court notes that, in the main proceedings, it is to apply the provisions of the EStG 1988 regarding eligibility for the investment premium of economic assets hired out for remuneration that are primarily used in other Member States. The referring court expresses doubts as to whether those provisions are compatible with Articles 43 EC and 49 EC, in so far as treatment is different depending on where a service is provided.

16 Although the order for reference mentions that Braunshofer set up a branch office in Germany, the description of the factual context in that order does not indicate that Jobra was refused the premium at issue in the main proceedings on the ground of considerations pertaining to the existence of such a place of business in another Member State.

17 In this context, it must be noted that it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or the definition of the factual context. The Court must 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 questions put to it are set (see, in particular, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10; Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 46; and Case C-244/06 *Dynamic Medien* [2008] ECR I-0000, paragraph 19).

18 Moreover, even if the Austrian Government's interpretation of the legislation at issue in the main proceedings were correct, the question referred by the Unabhängiger Finanzsenat would lose none of its relevance. Even if the grant of the investment premium was refused because the assets hired out for remuneration, for which that tax advantage is claimed, were used from a foreign place of business for a period exceeding half their period of use, that fact alone would not be enough to dispel the doubts expressed by the Unabhängiger Finanzsenat regarding the compatibility of the said legislation with the fundamental freedoms.

Existence of a restriction on the fundamental freedoms

19 The Court has consistently held that restrictions on the freedom of establishment and the freedom to provide services referred to in Articles 43 EC and 49 EC respectively are measures which prohibit, impede or render less attractive the exercise of such freedoms (see, to that effect Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 22; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 31; and Case C-248/06 *Commission* v *Spain* [2008] ECR I-0000, paragraph 21).

20 The German and Austrian Governments take the view that the legislation at issue in the main proceedings must be read in the light of the provisions of Articles 43 EC et seq. concerning freedom of establishment. According to those governments, that legislation constitutes an application of the principle of territoriality. A taxpayer using an economic asset from a domestic place of business is, from a fiscal point of view, not in a situation that is comparable to a taxpayer using such an asset from a foreign place of business. Given that the two situations are not comparable, the said legislation does not constitute a restriction on the fundamental freedoms.

21 The Commission takes the view that the provisions to be applied are the provisions on the freedom to provide services within the meaning of Article 49 EC. Jobra was refused the investment premium on the basis of national provisions governing the hiring out of economic assets for remuneration. Furthermore, the scope of the legislation at issue in the main proceedings is not limited to situations

arising within the same corporate group. According to the Commission, refusing the investment premium to a lessor on the assumption that the lessee might use the assets that it has hired for remuneration in other Member States impedes the exercise of that freedom.

22 In the present case, Jobra leases lorries to Braunshofer. The leasing of vehicles is a service within the meaning of Article 50 EC (see, in particular, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 18). Braunshofer uses those lorries for the purpose of carrying out its transport business.

23 According to the order for reference, pursuant to the legislation at issue in the main proceedings, Jobra was refused the investment premium because the lorries that it leased to Braunshofer were used by Braunshofer primarily in other Member States.

24 It must be held that national legislation such as that at issue in the main proceedings – which applies a less favourable tax regime to investments in assets which, once they have been hired out for remuneration, are used in other Member States, than to investments in such assets that are used domestically – is likely to discourage undertakings that would be eligible for that tax advantage from providing rental services to economic operators that carry out their activities in other Member States.

25 Moreover, in a situation in which an undertaking hires out assets for remuneration to another undertaking to which it has close economic ties, the national legislation at issue is likely to discourage the undertaking that has leased the assets from carrying out cross-border activities.

26 In the light of the foregoing considerations, it must be held that, as a rule, national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC. Therefore, it must be examined whether such a restriction can be objectively justified.

Possible justification for the legislation at issue in the main proceedings

27 It is clear from the case-law of the Court that a restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the EC Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it (see, in particular, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 101).

28 The Austrian and German Governments argue that the legislation at issue in the main proceedings is consistent with the allocation of taxation powers among the Member States. Granting the investment premium only on condition that the assets in respect of which it is claimed are allocated to a domestic place of business aims to ensure that there is a connection between, on the one hand, the granting of that tax advantage and, on the other hand, the taxation of profits generated through use of those assets.

29 The Austrian Government also invokes the need to prevent abuse. The legislation at issue in the main proceedings aims to prevent wholly artificial arrangements involving transfers for remuneration. If it were not for that provision, an asset allocated to a lessor would be eligible for an investment premium irrespective of where the lessee took that asset. A concern would be that the lessor could hand over all or part of that premium to the lessee which, for its part, could use that asset to generate profits in other Member States. Thus, it would be possible to circumvent the fact that that advantage is limited to Austria.

30 The Austrian Government explains that, without the legislation at issue in the main proceedings, it would be possible, merely by setting up the leasing company for a corporate group in Austria, to claim the investment premium for all the acquisitions made by that group, irrespective of where those assets are used.

31 According to the Commission, the legislation at issue in the main proceedings cannot be justified by the need to safeguard the coherence of the national tax system, by the need to preserve the effectiveness of fiscal supervision, or by purely economic objectives.

32 As regards the first ground of justification put forward by the Austrian and German Governments, it is true that the Court has acknowledged in its case-law that, in conjunction with other grounds of justification, the balanced allocation of the power to impose taxes between the Member States could be considered to be a legitimate requirement (see, in particular, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraphs 45, 46 and 51; Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 41; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 51; and Case C-414/06, *Lidl Belgium* [2008] ECR I-0000, paragraph 42). However, that case-law does not apply in circumstances such as those of the case in the main proceedings.

33 In this respect, there is no need to analyse all the conditions for the application of the above case-law and it is sufficient to note that, in the present case, the rental income generated by hiring out the tangible assets for which Jubra claims the investment premium is taxable in Austria. Therefore, it cannot be claimed that, without the legislation at issue in the main proceedings, the right of the Republic of Austria to exercise its taxing powers in relation to activities carried on in its territory would be jeopardised (see, also, *Marks & Spencer*, paragraph 46, and *Rewe Zentralfinanz*, paragraph 42).

34 In so far as the arguments of the interested parties who have submitted observations to the Court refer, more generally, to the need to safeguard the coherence of the national tax system, it must be noted that, as regards the tax system, there is no direct link between, on the one hand, the investment premium granted to the lessor for tangible goods it has acquired and, on the other hand, subsequent taxation of the income of the lessee, generated through use of those assets hired out to it for remuneration (see, by analogy, Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraphs 20 and 21).

35 As regards the justification alleging that there is a need to prevent abuse, it must be held that a national measure restricting the freedom to provide services can be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose only purpose is to obtain a tax advantage (see, to that effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 51 and 55, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 74).

36 In the present case, it cannot be claimed that it actually constitutes abuse for an undertaking that can claim the investment premium to hire out assets for remuneration to another undertaking which uses them primarily in other Member States.

37 Such hiring out cannot be the basis of a general presumption of abusive practice and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, *Test Claimants in the Thin Cap Group Litigation*, paragraph 73, and Case C-105/07 *Lammers & Van Cleef* [2008] ECR I-0000, paragraph 27).

38 In that context, it must be noted that the legislation at issue in the main proceedings affects every lessor eligible for the investment premium which hires out assets for remuneration to undertakings carrying out cross-border activities, and does so even where nothing points towards the existence of such an artificial arrangement. Furthermore, the legislation does not allow lessors to adduce evidence that no abuse is taking place.

39 Therefore, it must be held that the legislation at issue in the main proceedings does not make it possible to limit the refusal to grant the investment premium to cases involving wholly artificial arrangements. Moreover, it has not been claimed before the Court of Justice that such an arrangement exists in the case in the main proceedings.

40 In the light of the foregoing, it must be held that that legislation cannot be justified by overriding reasons of public interest.

41 Consequently, the answer to the question referred must be that Article 49 EC precludes Member State legislation, such as that at issue in the main proceedings, pursuant to which undertakings which acquire tangible assets are refused the benefit of an investment premium solely because the assets in respect of which that premium is claimed, which are hired out for remuneration, are used primarily in other Member States.

42 Given that the Treaty provisions on freedom to provide services preclude legislation such as that at issue in the main proceedings, there is no need to examine whether the Treaty provisions on freedom of establishment might do the same.

Costs

43 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 (Third Chamber) hereby rules:

Article 49 EC precludes Member State legislation, such as that at issue in the main proceedings, pursuant to which undertakings which acquire tangible assets are refused the benefit of an investment premium solely because the assets in respect of which that premium is claimed, which are hired out for remuneration, are used primarily in other Member States.

[Signatures]

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* Language of the case: German.