JUDGMENT OF THE COURT (Second Chamber)

15 September 2011 (*)

(Direct taxation – Free movement of capital – Article 63 TFEU – Inheritance tax on registered shares – Limitation period for the valuation of shares in non-resident companies longer than that applicable for resident companies – Restriction − Justification)

In Case C-132/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the rechtbank van eerste aanleg te Leuven (Belgium), made by decision of 12 February 2010, received at the Court on 15 March 2010, in the proceedings

Olivier Halley,

Julie Halley,

Marie Halley

v

Belgische Staat,

THE COURT (Second Chamber),

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

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 January 2011,

after considering the observations submitted on behalf of:

– Olivier Halley, Julie Halley and Marie Halley, by A. Biesmans and R. Deblauwe, advocaten,

– the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

– the European Commission, by R. Lyal, P. van Nuffel and W. Roels, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 26 TFEU, 49 TFEU, 63 TFEU and 65 TFEU.

2 The reference has been made in proceedings between Mr O. Halley, Ms J. Halley and Ms M. Halley and Belgische Staat (the Belgian State) concerning inheritance tax payable on registered shares in a company whose centre of effective management is not in Belgium.

Legal context

European Union legislation

3 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provides:

‘Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.’

4 The capital movements referred to in Article 1 of Directive 88/361 include, under heading XI of Annex I to the directive, ‘Personal capital movements’, inter alia inheritances and legacies.

National legislation

5 Article 1(1) of the Inheritance Tax Code (Wetboek Successierechten) laid down by Royal Decree No 308 of 31 March 1936 (*Belgisch Staatssblad*, 7 April 1936, p. 2403), confirmed by the Law of 4 May 1936 (*Belgisch Staatssblad*, 7 May 1936, p. 3426) (‘the Code’), provides that inheritance tax is payable on the value of all of the deceased’s estate inherited by his heirs, minus debts.

6 Article 111 of the Code provides:

‘For the purposes of establishing that there has been an undervaluation of the estate assets situated in the Kingdom of Belgium whose sale value has been declared, the Collector of taxes may, without prejudice to other means of proof provided for under Article 105, require an expert valuation of such assets; however, as regards tangible movable property, that entitlement to an expert valuation applies only to ships and boats.’

7 Point 2 of the first paragraph of Article 137 of the Code provides that the limitation period for claims ‘seeking the expert valuation of assets that are subject to such control and for tax, interest and penalties in the event of such assets being undervalued is 2 years, or 10 years for tax, interest and penalties in respect of undervalued assets which are not subject to expert valuation. In both cases the limitation period starts to run on the date of submission of the declaration.’

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

8 Mrs De Pinsun and Mr Halley, the parents of the applicants in the main proceedings, died simultaneously on 6 December 2003. They had been resident in Tervuren, Belgium, and the declaration of succession was required to be filed in Leuven.

9 On 16 August 2004 and on 16 August 2005, the applicants in the main proceedings paid EUR 16 million and EUR 4 million respectively as payment on account of inheritance tax due.

10 On 7 November 2005, the applicants in the main proceedings submitted two declarations to the tax authority of Leuven, one in respect of their father’s estate and the other in respect of their mother’s.

11 In each case, the estate included half of 2 172 600 jointly-owned registered shares in Carrefour SA, which, at the material time, had its registered office in Levallois-Perret (France), and 2 085 jointly-owned bearer shares in the same company. The applicants in the main proceedings valued the registered shares at EUR 28.31 per share, being the market value at the date of death, with a 35% reduction.

12 By letter of 20 February 2008, the derde Ontvangkantoor van de Registratie te Leuven (Third Collection Office of the Leuven Registry) notified the applicants in the main proceedings that, on 29 January 2008, the Central Administration in Brussels had determined that the shares were to be valued at EUR 43.55 per share.

13 In their application initiating proceedings before the national court, the applicants in the main proceedings allege, as their principal claim, that the Belgian tax authorities' action regarding undervaluation of the registered shares is time-barred. In the alternative, they contest the authorities' valuation of the shares.

14 According to the order for reference, on a reading of Article 111 in conjunction with point 2 of the first paragraph of Article 137 of the Code, the expert valuation of registered shares provided for by Article 111 is possible provided the shares are held in a company situated in Belgium. The shares are considered to be held in that Member State when the company's centre of effective management is situated there. The limitation period for the valuation of the shares is, in that case, two years. However, for shares held in a company whose centre of effective management is situated outside Belgian territory, an expert valuation is not possible and the limitation period increases to 10 years.

15 Taking the view that the dispute in the main proceedings raises questions of interpretation of European Union law, the rechtbank van eerste aanleg te Leuven decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is point 2 of the first paragraph of Article 137 of the Inheritance Tax Code …, in conjunction with Article 111 of the Inheritance Tax Code, compatible with Articles 26 [TFEU], 49 [TFEU], 63 [TFEU] and 65 [TFEU], given that the limitation period in respect of inheritance tax payable on registered shares is two years where the company's centre of effective management is in Belgium, but 10 years where the company's centre of effective management is not in Belgium?'

Consideration of the question referred

The freedom at issue in the main proceedings

16 The question referred by the national court refers to Articles 26 TFEU, 49 TFEU, 63 TFEU and 65 TFEU. In their observations submitted to the Court, the Belgian Government and the European Commission submit that only the last two of those provisions, that is to say, those which relate to the free movement of capital, are relevant to the main proceedings.

17 In that regard, it should be pointed out that, in order to determine whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from now well established case-law that the purpose of the legislation concerned must be taken into consideration (see Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22; Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 36).

18 In the case before the referring court, the purpose of the national legislation is to set the period within which a valuation may be made of registered shares held in a company whose centre of effective management is established outside Belgian territory and which are transferred by way of

inheritance.

19 According to the case-law of the Court, inheritances, which consist in the transfer to one or more persons of assets left by a deceased person and fall under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements', constitute movements of capital for the purposes of Article 63 TFEU, except in cases where their constituent elements are confined within a single Member State (see, to that effect, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 39 and the case-law cited). A situation such as that in the case before the referring court, in which the shares are held by a person residing in Belgium in a company whose centre of effective management is situated in France, in no way constitutes a purely internal situation.

20 It follows that the provisions of the FEU Treaty on the free movement of capital apply in a case such as that before the referring court.

21 It must therefore be held that, by its question, the national court is asking, in essence, whether Article 63 TFEU is to be interpreted as precluding legislation of a Member State which provides, as regards inheritance tax, for a limitation period for the valuation of registered shares which differs according to whether or not the centre of effective management of the company in which the deceased was a shareholder is situated in that Member State.

The existence of a restriction on the free movement of capital

22 It must be noted that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are liable to discourage non-residents from making investments in a Member State or from maintaining such investments (see, to that effect, Case C-377/07 *STEKO Industriemontage* [2009] ECR I-299, paragraphs 23 and 24; Case C-450/09 *Schröder* [2011] ECR I-0000, paragraph 30).

23 It appears from the order for reference that the legislation at issue in the main proceedings results in a distinction being made in relation to the limitation period for the valuation of registered shares for the purposes of inheritance tax according to the location of the issuing company's centre of effective management, since the limitation period for the valuation of shares issued by a company whose centre of effective management is established in Belgium is 2 years, whereas that period increases to 10 years where the shares are held in a company whose centre of effective management is in another Member State.

24 The application of a longer limitation period to heirs holding shares in a company whose centre of effective management is established in a Member State other than the Kingdom of Belgium may have the effect of deterring Belgian residents from investing or maintaining investments in assets situated outside that Member State, given that their heirs will experience a longer period of uncertainty as to the possibility of being subject to a tax adjustment.

25 Such national legislation therefore constitutes a restriction on the free movement of capital for the purposes of Article 63(1) TFEU.

The justification for the restriction on the free movement of capital

26 In order to justify the restriction on the free movement of capital, the Belgian Government relies on considerations relating to the need to guarantee the effectiveness of fiscal supervision, and the prevention of tax evasion.

27 According to that government, with regard to the effectiveness of fiscal supervision, the application of a longer limitation period for the valuation of shares situated in a Member State other than the

Kingdom of Belgium is necessary in order to be able to obtain information relating to those shares.

28 With regard to the prevention of tax evasion, that longer period offers the Belgian tax authorities the possibility, upon the discovery of an undervaluation of shares in companies located abroad, of initiating an investigation and, where it appears that the shares have been declared at too low a value for tax purposes, of applying an additional tax.

29 Furthermore, the Belgian Government contends that legislation such as that at issue in the main proceedings is necessary to compensate for the lack of a real possibility for the tax authorities to obtain information about assets held in a Member State other than the Kingdom of Belgium. That government observes that a request for information pursuant to Article 2 of 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 taxation (OJ 1977 L 336, p. 15) may be made by a Member State only where that Member State already possesses sufficient information to serve as a starting point.

30 In that regard, it is settled case-law that the need to guarantee the effectiveness of fiscal supervision and the prevention of tax evasion constitute overriding requirements of general interest capable of justifying a restriction on the exercise of the freedoms of movement guaranteed by the FEU Treaty (see, inter alia, regarding the prevention of tax evasion, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 32, and, regarding the effectiveness of fiscal supervision, Case C-318/07 *Persche* [2009] ECR I-359, paragraph 52).

31 However, a restriction on the free movement of capital is permissible on that ground only if it is appropriate to ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain that objective (see, inter alia, Case C-72/09 *Établissements Rimbaud* [2010] ECR I-0000, paragraph 33 and the case-law cited).

32 Even supposing that the legislation at issue in the main proceedings is appropriate to ensuring the attainment of the objectives relating to the need to ensure effectiveness of fiscal supervision and the prevention of tax evasion, it must be noted that such legislation goes beyond what is necessary to ensure the attainment of the objective pursued.

33 Indeed, it follows from the Court’s case-law relating to the recovery period in cases where savings balances and/or income therefrom are concealed from the tax authorities that two situations must be distinguished. The first is where taxable items have been concealed and the authorities do not have any evidence which would enable an investigation to be initiated. The second is where the authorities have evidence concerning taxable items (Joined Cases C-155/08 C/157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, paragraphs 62 and 63).

34 In the main proceedings, it is undisputed that the registered shares at issue had been mentioned in the inheritance declarations, so that the tax authorities of the Member State concerned have information relating to those shares. The legislation at issue in the main proceedings therefore comes within the scope of the second situation mentioned in the previous paragraph.

35 In relation to that second situation, the Court has held, at paragraph 74 of the judgment in *X and Passenheim-van Schoot*, that the application of an extended recovery period which is not specifically intended to permit the tax authorities of that Member State to have effective recourse to mechanisms of mutual assistance between Member States and which commences once the taxable items concerned are located in another Member State cannot be justified.

36 Indeed, where the tax authorities of a Member State have evidence enabling them to request the

competent authorities of other Member States, whether by way of the mutual assistance provided for in Directive 77/799 or of that provided for under bilateral conventions, to communicate to them the information necessary to establish the correct amount of tax due, the mere fact that the taxable items concerned are located in another Member State does not justify the general application of an additional recovery period which is in no way based on the time needed to have effective recourse to those mechanisms of mutual assistance (*X and Passenheim-van Schoot*, paragraph 75).

37 It is true that the said directive does not apply to inheritance tax. However, it appears from the file submitted to the Court that it may nevertheless have been possible for the Belgian tax authorities to have recourse to other mutual assistance instruments to verify the value of the shares in question, such as, for instance, the convention between France and Belgium for the avoidance of double taxation and the regulation of certain other issues in the field of inheritance tax and registration charges, done at Brussels on 20 January 1959.

38 In any event, as the Commission has rightly pointed out, in order to assess the value of shares quoted on the stock market such as those at issue in the main proceedings, there is nothing to stop the Belgian tax authorities consulting, either in the press or on the internet, the quoted value of those shares at the date of death of the holder in order to initiate their investigation. As is apparent from the file submitted to the Court, this is in fact the basis on which the shares at issue in the main proceedings were finally valued by the Belgian tax authorities, over two years after the submission of the inheritance declarations.

39 Accordingly, the application of a limitation period of 10 years for the valuation of shares held in a company whose centre of effective management is situated in a Member State other than the Kingdom of Belgium cannot be justified, in so far as the general application of such a period is in no way based on the time needed to have effective recourse to mechanisms of mutual assistance or other alternative means of investigating the value of those shares.

40 It follows from all the foregoing that the answer to the question referred is that Article 63 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings which provides, as regards inheritance tax, for a limitation period of 10 years for the valuation of registered shares in a company in which the deceased was a shareholder and whose centre of effective management is established in another Member State, while the same limitation period is 2 years when the company’s centre of effective management is in the first Member State.

Costs

41 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:

Article 63 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings which provides, as regards inheritance tax, for a limitation period of 10 years for the valuation of registered shares in a company in which the deceased was a shareholder and whose centre of effective management is established in another Member State, while the same limitation period is 2 years when the company’s centre of effective management is in the first Member State.

[Signatures]

* Language of the case: Dutch.