JUDGMENT OF THE COURT (Fourth Chamber)

6 September 2012 (*)

(Failure of a Member State to fulfil obligations – Article 49 TFEU – Tax legislation – Transfer of residence for tax purposes – Transfer of assets – Immediate exit tax)

In Case C-38/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 22 January 2010,

European Commission, represented by R. Lyal, G. Braga da Cruz and P. Guerra e Andrade, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes and J. Menezes Leitão, acting as Agents,

defendant,

supported by:

Kingdom of Denmark, represented by C. Vang, acting as Agent,

Federal Republic of Germany, represented by C. Blaschke and K. Petersen, acting as Agents,

Kingdom of Spain, represented by M. Muñoz Pérez and A. Rubio González, acting as Agents,

French Republic, represented by G. de Bergues and N. Rouam, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and M. de Ree, acting as Agents,

Republic of Finland, represented by J. Heliskoski, acting as Agent,

Kingdom of Sweden, represented by A. Falk and S. Johannesson, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by S. Hathaway and A. Robinson, acting as Agents,

interveners,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann (Rapporteur), L. Bay Larsen, C. Toader and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 April 2012,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2012,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that, by adopting and maintaining in force Articles 76 A, 76 B and 76 C of the Corporation Tax Code (Código do Imposto sobre o Rendimento das Pessoas Colectivas; 'the CIRC'), which are applicable in the case of transfer, by a Portuguese company, of its registered office and its effective management to another Member State or in the case of cessation of the activities of a permanent establishment in Portugal or of transfer of its assets from Portugal to another Member State, and which provide:

– that the basis of assessment for the financial year in which the chargeable event takes place includes all unrealised capital gains relating to the assets concerned, but not unrealised capital gains resulting from purely national transactions;

– that the members of a company which transfers its registered office and its effective management outside Portuguese territory are subject to a tax on the difference between the company's net asset value (calculated at the date of the transfer, at the market price) and the cost of acquiring the corresponding shares,

the Portuguese Republic has failed to fulfil its obligations under Article 49 TFEU and Article 31 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

Legal context

2 Decree-Law No 159/2009 (Decreto-Lei n.° 159/2009) of 13 July 2009 (*Diário da República* I, Series A, No 133, of 13 July 2009) inter alia renumbered the articles of the CIRC that are relevant in the present proceedings. In accordance with the Court's settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. That decree-law entered into force on 1 January 2010, whereas the period laid down by the Commission expired on 1 February 2009. Account will therefore not be taken in the present proceedings of the amendments resulting from the entry into force of Decree-Law No 159/2009.

3 Articles 76 A, 76 B and 76 C of the CIRC were worded as follows:

'Article 76 A

Transfer of residence

1. For the purpose of determining the taxable profit for a financial year in which there is cessation of the activity of an entity, including of a European company and of a European cooperative society, whose seat or effective management is in Portuguese territory, on account of the seat and effective management ceasing to be situated in that territory, the differences between the market values and the book values relevant for tax purposes of its assets at the date upon which activity ceases shall constitute gains or losses.

2. The provisions of paragraph 1 shall not apply to assets which in fact remain allotted to a permanent establishment of the same entity and contribute to its taxable profit, provided that the conditions laid down in Article 68(3) are met *mutatis mutandis* for those assets.

3. The provisions of Article 68(4) shall apply *mutatis mutandis* to determination of the permanent establishment's taxable profit.

4. In the case referred to in paragraph 2, tax losses prior to the cessation of activity may be deducted from the taxable profit attributable to the permanent establishment of the non-resident entity, in accordance with the terms and conditions laid down in Article 15.

5. The special regime laid down in paragraphs 2, 3 and 4 shall not apply to the cases referred to in Article 67(10) of the CIRC.

Article 76 B

Cessation of activity of a permanent establishment

The provisions of paragraph 1 of the preceding article shall apply *mutatis mutandis* to determination of the taxable profit attributable to a non-resident entity's permanent establishment situated in Portuguese territory:

(a) in the case of cessation of its activity in Portuguese territory;

(b) in the case of the transfer outside Portuguese territory, whatever the substantive or legal method, of assets allotted to the permanent establishment.

Article 76 C

Regime applicable to members

1. For the financial year in which the registered office and the effective management are transferred outside Portuguese territory, account shall be taken, for the purpose of taxation of the members, of the difference between the net asset value at that date and the cost of acquiring the corresponding shares, applying *mutatis mutandis* the provisions of Article 75(2) and (4).

2. For the purpose of applying the provisions of the preceding paragraph, the assets shall be assessed at their market value.

3. Transfer of the seat of a European company or a European cooperative society shall not entail, in itself, application of the provisions of paragraph 1.'

4 Article 43(1) of the CIRC provided that 'gains obtained or losses incurred in respect of fixed assets on a transfer for consideration by whatever means shall be regarded as realised capital gains or capital losses, as shall those resulting from accidents or those resulting from the permanent assignment of those assets to purposes other than the activity pursued'.

5 Article 43(2) provided that capital gains and capital losses corresponded to 'the difference between the realisation value, net of the charges applicable to them, and the acquisition value after deduction of any write-downs and depreciation'.

6 In accordance with Article 43(3) of the CIRC, the realisation value of the transfer of the assets for consideration corresponded to the amount of the consideration but in the case of property

permanently assigned to purposes other than the activity pursued the realisation value was its market value.

Pre-litigation procedure

7 Since the Commission took the view, in the light of the information available at the time, that the Portuguese Republic was not complying with its obligations under Article 43 EC by taxing unrealised capital gains immediately, pursuant to Articles 76 A, 76 B and 76 C of the CIRC, in the case of transfer of the registered office and the effective management of a Portuguese company to another Member State or in the case of transfer of the assets of a permanent establishment that is situated in Portuguese territory to another Member State, on 29 February 2008 it sent a letter of formal notice to the Portuguese Republic calling upon it, in accordance with Article 226 EC, to submit its observations.

8 In its reply dated 10 July 2008, the Portuguese Republic contested the Commission's position.

9 On 1 December 2008 the Commission issued a reasoned opinion in which it took the view that the Portuguese Republic had failed to fulfil its obligations under Article 43 EC and Article 31 of the EEA Agreement by adopting Articles 76 A, 76 B and 76 C of the CIRC and maintaining them in force, and it called upon the Portuguese Republic to take the measures necessary to comply with its obligations within a period of two months from receipt of the reasoned opinion.

10 Since the Portuguese Republic maintained, in its reply of 6 April 2009, that it considered the Commission's position to be incorrect, the Commission decided to bring the present action.

Procedure before the Court

11 By order of the President of the Court of 28 June 2010, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the Portuguese Republic.

12 Following delivery, on 29 November 2011, of the judgment in Case C-371/10 *National Grid Indus* [2011] ECR I-12273, all the interveners were requested, pursuant to Article 54a of the Rules of Procedure of the Court of Justice, to give their view in writing on the inferences to be drawn, in the present case, from that judgment.

13 The Kingdom of Denmark and the Portuguese Republic sent their response to the Court Registry on 21 and 27 March 2012 respectively. The Federal Republic of Germany, the Kingdom of the Netherlands and the United Kingdom informed the Court Registry of their response on 29 March 2012. The Kingdom of Spain, the French Republic, the Kingdom of Sweden and the Commission forwarded their response to the Court Registry on 30 March 2012.

Admissibility of the action

14 Although the Portuguese Government does not raise in its written submissions any plea of inadmissibility in respect of the present action, the Court may, as the Advocate General observes in points 11 to 13 of his Opinion, check of its own motion whether the conditions laid down by Article 256 TFEU for bringing an action for failure to fulfil obligations are satisfied.

15 In this connection, it should be borne in mind in particular that the letter of formal notice sent by

the Commission to the Member State concerned and the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The reasoned opinion and the proceedings brought by the Commission must consequently be based on the same complaints as those raised in the letter of formal notice initiating the pre-litigation procedure (see, to this effect, Case C-457/07 *Commission* v *Portugal* [2009] ECR I-8091, paragraph 55, and Case C-535/07 *Commission* v *Austria* [2010] ECR I-9483, paragraph 41).

16 If that is not the case, that irregularity cannot be regarded as having been cured by the fact that the defendant Member State submitted observations on the reasoned opinion (see *Commission* v *Austria*, paragraph 41 and the case-law cited). In accordance with settled case-law, the pre-litigation procedure constitutes an essential guarantee not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see, inter alia, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 35, and Case C-392/99 *Commission* v *Portugal* [2003] ECR I-3373, paragraph 133).

17 In the present case, it is not in dispute, as the Commission indeed acknowledged at the hearing, that the letter of formal notice sent to the Portuguese Republic on 29 February 2008 did not contain any reference to an alleged infringement of Article 31 of the EEA Agreement.

18 Consequently, the action must be declared inadmissible in so far as it concerns infringement of that provision.

19 Furthermore, the Commission has not explained sufficiently precisely how Article 76 C of the CIRC, which provides that members are to be taxed immediately on unrealised capital gains relating to stakes in the capital of companies when their registered office and their effective management are transferred to another Member State, is liable to constitute an obstacle to the freedom of establishment of the companies in question.

20 The Commission’s second complaint must consequently be declared inadmissible.

The action

21 It must be stated at the outset that the Commission does not dispute the Member States’ right to tax capital gains that have arisen in their respective territories.

22 In essence, the objection raised by it against the Portuguese Republic concerns the difference in fiscal treatment of unrealised capital gains that is established by the provisions at issue between, on the one hand, a transfer of activities of a company to another Member State and, on the other, similar transfers within Portuguese territory. When a company exercises its right to freedom of establishment and transfers activities from Portuguese territory to another Member State, that cannot, according to the Commission, result in the imposition of tax that would be levied earlier or would be of a greater amount than the tax that would be applicable to a company which transfers activities but remains in Portuguese territory. In the Commission’s submission, the provisions at issue are consequently liable to give rise to obstacles to freedom of establishment and they infringe Article 49 TFEU.

23 As the Advocate General notes in points 26 and 49 to 54 of his Opinion, it is not in dispute, in the light in particular of the judgment in *National Grid Indus*, that freedom of establishment is applicable to transfers of activities of a company from Portuguese territory to another Member State, irrespective of whether the company in question transfers its registered office and its effective management outside Portuguese territory or whether it transfers assets of a permanent establishment that is situated in Portuguese territory to another Member State.

24 Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. That freedom entails, for companies formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the European Community, the right to pursue their activities in other Member States through a subsidiary, a branch or an agency (see Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 28, and Case C-337/08 *X Holding* [2010] ECR I-1215, paragraph 17).

25 Even though, according to their wording, the provisions of the FEU Treaty on freedom of establishment are 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 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 (*National Grid Indus*, paragraph 35 and the case-law cited).

26 It is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom (*National Grid Indus*, paragraph 36 and the case-law cited).

27 Consequently, it is clear, as the Commission submits in its first complaint, that Articles 76 A and 76 B of the CIRC entail obstacles to freedom of establishment given that, in the case of transfer, by a Portuguese company, of its registered office and its effective management to another Member State and in the case of partial or total transfer to another Member State of the assets of a permanent establishment in Portuguese territory of a company not resident in Portugal, such a company is penalised financially compared with a similar company which maintains its activities in Portuguese territory.

28 Under those provisions, a Portuguese company which transfers its registered office and its effective management outside Portuguese territory is taxed on unrealised capital gains. By contrast, that is not so where that company maintains its seat in Portuguese territory, as it is taxed only on realised capital gains. Furthermore, those provisions also impose taxation of unrealised capital gains in the case of partial or total transfer to another Member State of the assets of a permanent establishment in Portuguese territory of a company not resident in Portugal, whereas a transfer of assets in Portuguese territory does not result in such taxation. That difference in treatment is liable to deter a company from transferring its activities from Portuguese territory to another Member State (see, to this effect, Case C-380/11 *DI. VI. Finanziaria di Diego della Valle & C.* [2012] ECR, paragraph 36).

29 The difference in treatment found cannot be explained by an objective difference of situation. As the Advocate General observes, in essence, in points 55, 94 to 99 and 111 of his Opinion, from the point of view of legislation of a Member State aiming to tax capital gains generated in its territory the situation of a company which transfers its registered office and its effective management to another Member State and that of a company which transfers some or all of the assets of a Portuguese permanent establishment to another Member State are, as regards taxation of the capital gains which have been generated in the first Member State before those operations, analogous to that of a company limiting such operations to national territory (see, to this effect, *DI. VI. Finanziaria di Diego della Valle & C.*, paragraph 37).

30 In so far as Article 76 B(a) of the CIRC provides for taxation in a situation where the cessation of activity on Portuguese territory is the consequence not of a transfer of all the activities related to a Portuguese permanent establishment to another Member State but of cessation, by the company liable to tax, of the economic activity in question, it must be found in the light of Article 43 of the

CIRC that there is no difference in treatment between a situation falling within Article 49 TFEU and a purely domestic situation. As the Portuguese Republic has pointed out, Article 43 of the CIRC provides for a Portuguese company to be taxed on unrealised capital gains relating to assets detached from the company's economic activity. To that extent, there is thus no restriction on freedom of establishment.

31 So far as concerns the existence of any justification for the restriction on freedom of establishment that has been found and the justification's proportionality, the Court held in *National Grid Indus*, paragraph 86, that Article 49 TFEU precludes legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer.

32 Furthermore, as is apparent from paragraph 73 of the judgment in *National Grid Indus*, national legislation offering a company transferring its place of effective management to another Member State the choice between, first, immediate payment of the amount of tax and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the measures at issue in the main proceedings.

33 In this connection, the Portuguese Republic acknowledged in its written response to the Court's question referred to in paragraph 12 of the present judgment that, if the Court were to find that its legislation does restrict the exercise of freedom of establishment, it would be incumbent upon it to introduce into its national legislation the possibility for companies wishing to transfer their seat to another Member State not to have to pay immediately the entire amount of the tax on unrealised capital gains that have been generated in Portuguese territory.

34 It should be added that, contrary to the Portuguese Republic's submissions at the hearing, the same conclusion as in paragraph 31 of the present judgment is necessary so far as concerns the taxation of unrealised capital gains relating to assets of a permanent establishment situated in Portuguese territory which are transferred to another Member State. The observation in paragraph 57 of the judgment in *National Grid Indus* that 'the assets of a company are assigned directly to economic activities that are intended to produce a profit', upon which the Portuguese Republic relies, was made not in the context of examination of whether the national legislation relevant in the case in question was restrictive but in the context of the analysis of its proportionality in that it did not take into account decreases in value occurring after the transfer of a company's place of effective management to another Member State. As the Advocate General observes in point 102 of his Opinion, it is therefore not possible to infer from that statement by the Court that, on the one hand, the disconnection of the assets of a permanent establishment from any economic activity in a Member State and, on the other, the transfer of such assets to another Member State upon the cessation of that permanent establishment's activity in the former Member State are comparable situations.

35 In the light of all these considerations, it must be held that, in so far as the Commission's first complaint alleges infringement of Article 49 TFEU, it is well founded to the extent that it concerns the transfer, by a Portuguese company, of its registered office and its effective management to another Member State or the transfer, by a company not resident in Portugal, of some or all of the assets attached to a Portuguese permanent establishment from Portugal to another Member State, and the action must be dismissed as to the remainder.

Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Declares that, by adopting and maintaining in force Articles 76 A and 76 B of the Corporation Tax Code (Código do Imposto sobre o Rendimento das Pessoas Colectivas), which are applicable in the case of transfer, by a Portuguese company, of its registered office and its effective management to another Member State or in the case of transfer, by a company not resident in Portugal, of some or all of the assets attached to a Portuguese permanent establishment from Portugal to another Member State, and which prescribe the immediate taxation of unrealised capital gains relating to the assets concerned but not of unrealised capital gains resulting from purely national operations, the Portuguese Republic has failed to fulfil its obligations under Article 49 TFEU;

2. Dismisses the action as to the remainder;

3. Orders the Portuguese Republic to pay the costs.

[Signatures]

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* Language of the case: Portuguese.