JUDGMENT OF THE COURT (Fourth Chamber)

6September 2012 (*)

(Freedom of establishment – Article 49 TFEU – Tax legislation – Capital tax – Conditions for granting a reduction in capital tax – Situation where a company is no longer liable to capital tax following transfer of its seat to another Member State – Restriction – Justification – Overriding reasons in the public interest)

In Case C-380/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the tribunal administratif (Luxembourg), made by decision of 13 July 2011, received at the Court on 18 July 2011, in the proceedings

DI. VI. Finanziaria di Diego della Valle & C. SapA

v

Administration des contributions en matière d'impôts,

THE COURT (Fourth Chamber),

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

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 28 March 2012,

after considering the observations submitted on behalf of:

– DI. VI. Finanziaria di Diego della Valle & C. SapA, by J.-P. Winandy, avocat,

– the Luxembourg Government, by C. Schiltz, acting as Agent, and by M. Adams, avocat,

– the European Commission, by C. Soulay 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 Article 49 TFEU.

2 The reference has been made in the course of proceedings between DI. VI. Finanziaria di Diego della Valle & C. SapA ('DIVI'), a company incorporated under Italian law whose registered office

is in Italy, and the Luxembourg tax authorities concerning the withdrawal, due to the transfer of the seat of DA. DV. Family Holding Sàrl ('DADV') to a Member State other than the Grand Duchy of Luxembourg, of the capital tax reduction that that company was receiving.

The Luxembourg legal framework

3 The Law on Capital Tax of 16 October 1934 (Loi du 16 octobre 1934 concernant l'impôt sur la fortune), as amended by the Law of 21 December 2001 to amend certain provisions relating to direct and indirect taxation (Loi du 21 décembre 2001 portant réforme de certaines dispositions en matière d'impôts directs et indirects, *Mémorial* A 2001, 157, p. 3312) ('the LIF'), governs direct capital taxation.

4 It is clear from that law that collective undertakings are liable to that direct tax.

5 Paragraph 8a of the LIF provides for the possibility of a reduction in capital tax for the taxable persons referred to in point 2 of subparagraph 1 of Paragraph 1 of the LIF, including collective undertakings, and governs the conditions for granting such a reduction.

6 Paragraph 8a of the LIF reads as follows:

'1. Upon application to be submitted with the income tax return, taxpayers as referred to in point 2 of subparagraph 1 of Paragraph 1 who undertake to include, by allocating from the profit of a given tax year, a reserve in their balance sheet to be maintained for the next five tax years, shall receive a reduction of the capital tax due for that tax year. That reduction shall amount to one fifth of the reserve constituted but may not exceed the corporate income tax, increased by the contribution to the Employment Fund, due before attribution of any credits for that tax year. The reserve must be constituted upon application of profits for the financial year, but at the latest upon closure of the financial year following that conferring entitlement to the reduction.

…

3. Where the reserve is used before expiry of the five-year period for purposes other than capitalisation, the taxpayer's capital tax liability shall increase for the tax year in question by one-fifth of the reserve amount used.

…

In the event of merger or acquisition, the acquiring company or any company of the group may roll over the reserve appearing in the balance sheet of the acquired company in order to meet the condition regarding the five-year holding period.'

7 Luxembourg legislation provides for the possibility of a resident company transferring its seat to another State, and for the tax consequences of such a transfer, in Article 172 of the Law on Income Tax (Loi concernant l'impôt sur le revenu, *Mémorial* A 1967, 79, p. 1228) ('the LIR'), as amended, which refers to Article 169 of that law.

8 Article 172 of the LIR provides:

'1. Where a resident collective undertaking transfers its registered office and its central administration abroad and therefore ceases to be a resident taxpayer, the provisions of Article 169 shall be applicable. The estimated realisable value of all the assets and liabilities on the balance sheet at the time of the transfer shall be deemed to be the net proceeds of liquidation.

...’

9 Article 169 of the LIR provides:

‘1. Collective undertakings that are dissolved shall be taxable on the net profit realised during their liquidation.

...

5. The invested net assets, at the time of dissolution, shall be those upon closure of the financial year prior to that dissolution, as accepted for the purposes of calculating corporate income tax. If the taxation has not been carried out on that basis, an assessment shall be made by the tax authority. The invested net assets shall be reduced by the amount of profit from the previous year that was distributed after the end of the financial year.

...’

The facts of the main proceedings and the question referred for a preliminary ruling

10 DADV is a company incorporated under Luxembourg law. Until 12 October 2006, it had its seat in Luxembourg. On that date it transferred that seat to Italy.

11 For the year 2004, DADV received a capital tax reduction of EUR 50 965, which corresponded to the amount of capital tax owed by that company on a taxable base of EUR 10 193 000. The amount of the non-distributable reserve constituted under subparagraph 1 of Paragraph 8a of the LIF, by allocating from the profit of the 2004 tax year, was EUR 254 825.

12 It is apparent from the tax declaration drawn up by DADV for the financial year 2005 that it stated its taxable base to be EUR 9 364 604, which generated a capital tax amount of EUR 46 820, for which it sought exemption by constituting a non-distributable reserve of EUR 234 100.

13 For the year 2006, DADV declared a taxable base of EUR 249 987, giving rise to capital tax in the amount of EUR 1 245.

14 During the month of December 2006, DIVI absorbed DADV by merger.

15 As the successor to DADV, in respect of the period during which DADV was a taxpayer in Luxembourg, DIVI applied under Paragraph 8a of the LIF for a reduction of the capital tax due from the former company for the financial years 2005 and 2006.

16 The tax authority refused to grant those applications on the ground that the conditions provided for in Article 8a of the LIF were not met.

17 Accordingly, on 15 July 2009, the tax office issued a tax notice concerning DADV for each of the years concerned. In the first notice, concerning the financial year 2005, the tax authority considered that the taxable base of that company was, on 1 January 2005, EUR 9 364 000 and, consequently, fixed the amount of capital tax due at EUR 46 820.

18 In the second notice, concerning the financial year 2006, the tax authority assessed the taxable base on 1 January 2006 at EUR 9 131 000 and the amount of the capital tax due at EUR 45 655.

19 Furthermore, in that notice, the tax office stated that DADV had prematurely distributed the reserve constituted in accordance with Paragraph 8a of the LIF on allocation of the profit of the financial

year 2004. Consequently, that office sought payment from DADV in the amount of EUR 50 965, equivalent to the capital tax reduction received by that company for the financial year 2004.

20 By a complaint made on 9 October 2009, DIVI requested that those two tax notices be amended or annulled, arguing that it should have received a tax reduction pursuant to Paragraph 8a of the LIF, since it had constituted a non-distributable reserve as provided for in that provision.

21 As the tax authority did not respond to that complaint, on 15 October 2009 DIVI brought proceedings before the tribunal administratif (Administrative Court) seeking amendment or annulment of those tax notices.

22 Before that court, DIVI stated that the tax office had incorrectly applied Paragraph 8a of the LIF. It claimed that DADV had constituted a special reserve in its balance sheet for the capital tax corresponding to five times the amount of the tax due for the years 2004, 2005 and 2006. Following the transfer of its seat to Italy, DADV maintained that reserve on the balance sheet. After the merger, the reserve was still maintained in the merger reserve and was included in the company accounts of the acquiring company as at 31December 2008.

23 In that regard, before the referring court, the tax authority stated that the tax reduction applied for had been refused, not because of a premature distribution of the reserve as referred to in subparagraph 3 of Paragraph 8a of the LIF, but on the ground that a taxpayer who applies for a capital tax reduction under Paragraph 8a of the LIF must be established in Luxembourg when it constitutes that reserve and must remain there throughout the period during which the reserve is maintained, corresponding to the next five tax years. In the present case, however, DADV was not liable to capital tax throughout the entire five-year period during which it held the reserve, as required by subparagraph 1 of Paragraph 8a of the LIF.

24 According to the referring court, the tax notices in question had been issued because of non-compliance with the requirement of being liable to Luxembourg capital tax throughout the entire period provided for by Paragraph 8a of the LIF.

25 DIVI claims, however, that the tax office’s interpretation of Paragraph 8a of the LIF is contrary to European Union law, and specifically to freedom of establishment.

26 The referring court notes that Paragraph 8a of the LIF, and particularly the condition which makes the capital tax reduction conditional upon maintaining the reserve on the balance sheet for the next five tax years, necessarily implies that a company seeking to receive that reduction must remain liable for capital tax during that period. A provision of that nature is thus liable to render the establishment of resident companies in a Member State other than the Grand Duchy of Luxembourg less attractive.

27 In those circumstances, the tribunal administratif decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 49 of the Treaty on the Functioning of the European Union to be interpreted as precluding a measure, such as that governed by Paragraph 8a of the LIF, subparagraph 1 of which makes the grant of a reduction in capital tax conditional upon remaining liable to Luxembourg capital tax for the next five tax years?’

Consideration of the question referred

The applicability of the Treaty provisions on freedom of establishment

28 In the main proceedings, it is established that DADV, a company incorporated in Luxembourg, subsequently transferred its seat from Luxembourg to Italy. The referring court states that, as a result of that transfer, DADV ceased to fulfil the requirement of being liable to Luxembourg capital tax throughout the entire period provided for in Paragraph 8a of the LIF and for that reason received the tax notices at issue in the main proceedings.

29 In those circumstances, it should be observed that the legislation at issue in the main proceedings is limited to attaching tax consequences, for companies incorporated under national law, to the situation in which those companies find themselves when they cease to be liable to Luxembourg capital tax, in particular following the transfer of their seat to another Member State (see, to that effect, Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 31).

30 It follows that DADV, which benefits from the Treaty provisions on freedom of establishment as a company incorporated under the legislation of a Member State and having its seat within the European Union, in accordance with Article 54 TFEU, can rely on its rights under Article 49 TFEU to challenge the lawfulness of the withdrawal, by reason of the transfer of its seat to another Member State, of a tax benefit that it could claim in respect of the period during which it had its seat in Luxembourg and was accordingly liable to capital tax in that Member State.

31 Consequently, the provisions of the TFEU relating to freedom of establishment apply to a situation such as that at issue in the main proceedings.

Whether there is a restriction on the freedom of establishment

32 Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. Even though, according to their wording, the Treaty provisions 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 (see *National Grid Indus*, paragraph 35 and the case-law cited).

33 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 (see Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 34; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 30; and Case C-96/08 *CIBA* [2010] ECR I-2911, paragraph 19).

34 In the main proceedings, it should be noted that a company incorporated under Luxembourg law that transfers its seat outside Luxembourg during the five-year period following the tax year during which a capital tax reduction, such as that at issue in the main proceedings, was granted to it is treated less favourably than a similar company that continues to have its seat in Luxembourg.

35 Under the national legislation at issue in the main proceedings, the transfer of the seat of a Luxembourg company to a Member State other than the Grand Duchy of Luxembourg during that period entails the immediate withdrawal of the benefit of the tax reduction, whereas there is no such withdrawal if that company continues to have its seat in Luxembourg. The benefit of the capital tax reduction granted to a company whose seat remains in Luxembourg is withdrawn only if the reserve provided for in subparagraph 3 of Paragraph 8a of the LIF is used, before expiry of the five-year period, for purposes other than capitalisation of the company.

36 That difference of treatment with regard to the system of capital tax reduction at issue in the main

proceedings, which may have negative repercussions on the assets of companies wishing to transfer their seat outside Luxembourg, is liable to deter companies incorporated under Luxembourg law from transferring their seat to another Member State during the five-year period following the tax year in the course of which the capital tax reduction was granted to them (see, to that effect, Case C-9/02 *Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 46; Case C-470/04 *N* [2006] ECR I-7409, paragraph 35; and Case C-38/10 *Commission* v *Portugal* [2012] ECR, paragraph 28).

37 Contrary to what is argued by the Luxembourg Government, that difference of treatment cannot be explained by an objective difference of situation. From the point of view of legislation of a Member State aiming to grant a reduction of the tax on capital generated in its territory, the situation of a company incorporated under the law of that Member State which transfers its seat to another Member State is similar to that of a company, also incorporated under the law of the first Member State, which continues to have its seat in that Member State, as regards the reduction of the tax on capital generated in the first Member State before the transfer of the seat (see, to that effect, *National Grid Indus*, paragraph 38, and *Commission* v *Portugal*, paragraph 29).

38 The Luxembourg Government initially argued that the loss of the benefit of Paragraph 8a of the LIF, and specifically the retroactive loss of the capital tax reduction for DIVI, is a consequence not of the transfer of DADV's seat out of Luxembourg, but of the failure to comply with the two conditions referred to in subparagraphs 1 and 3 of Paragraph 8a of the LIF, which require that the reserve be kept on the company's balance sheet for the five years following its formation and that it should not be used for other purposes.

39 That argument cannot be accepted. The loss of the benefit of the capital tax reduction at issue in the main proceedings is not the consequence of the use of the reserve, before expiry of the five-year period, for purposes other than those referred to in subparagraph 3 of Paragraph 8a of the LIF. It is clear from the documents submitted to the Court that DADV and, subsequently, DIVI kept on their balance sheet the reserve referred to in subparagraph 1 of Paragraph 8a of the LIF. Therefore, as the Luxembourg Government subsequently acknowledged, the loss of the advantage referred to in Paragraph 8a of the LIF is the consequence of the fact that DADV was not liable to Luxembourg capital tax for the period of five years following the constitution of the reserve referred to in subparagraph 1 of Paragraph 8a of the LIF. If DADV had kept its seat in Luxembourg, it would have continued to benefit from that tax advantage.

40 It follows that the difference of treatment that is applied, under the provisions of national law at issue in the main proceedings, to Luxembourg companies which transfer their seat to another Member State, in comparison with Luxembourg companies which keep their seat in Luxembourg, constitutes a restriction on the freedom of establishment, which is in principle prohibited by the provisions of the TFEU.

The justification for the restriction on the freedom of establishment

41 According to settled case-law, a restriction on the freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that it should be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (see *National Grid Indus*, paragraph 42 and the case-law cited).

42 According to the Luxembourg Government, the restriction on the freedom of establishment is justified by the objective of ensuring the balanced allocation of powers of taxation between the Member States, in accordance with the principle of territoriality.

43 In that regard, it must be recalled that preserving the allocation of powers of taxation between the Member States is a legitimate objective recognised by the Court (*National Grid Indus*, paragraph 45 and the case-law cited).

44 In circumstances such as those of the main proceedings, however, the restriction on the freedom of establishment cannot be justified by the requirement of the balanced allocation of powers of taxation between the Member States.

45 It suffices to note in this respect, as the European Commission does, that withdrawing from a company the capital tax reduction which it was receiving and requiring immediate payment when the company transfers its seat to a Member State other than the Grand Duchy of Luxembourg do not ensure either the powers of taxation of the latter Member State or the balanced allocation of the powers of taxation between the Member States concerned. The very nature of the mechanism of withdrawing an advantage implies that the Member State had agreed, in advance, to grant that advantage and, consequently, to reduce the capital tax of resident taxpayers if the conditions referred to in Paragraph 8a of the LIF were satisfied.

46 Moreover, the restriction at issue in the main proceedings cannot be justified by the need to ensure the coherence of the national tax system, which the Court has acknowledged constitutes an overriding reason in the public interest (see, to that effect, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28, and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 21).

47 For an argument based on such a justification 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 Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 62 and the case-law cited). There is no such direct link when it is a question, in particular, of different taxes or the tax treatment of different taxpayers (see, to that effect, Case C-168/01 *Bosal* [2003] ECR I-9409, paragraph 30, and Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraph 77).

48 It is clear from the national legislation at issue in the main proceedings that there is no direct link between, on the one hand, the grant of a reduction in capital tax to a company that complies with the conditions referred to in subparagraph 1 of Paragraph 8a of the LIF and, on the other, the objectives pursued by that legislation, in particular offsetting that tax advantage with additional revenue from corporate income tax and trade tax on operating profit during the years when the reserve referred to in subparagraph 1 of Paragraph 8a of the LIF is maintained.

49 Therefore, as the Commission emphasises, the remote and uncertain nature of such subsequent taxation cannot justify the restriction on the freedom of establishment resulting from that paragraph of the LIF.

50 With regard to the main objective pursued by the tax system referred to in Paragraph 8a of the LIF, as formulated in the preparatory work prior to its adoption, namely to increase the national tax revenue, it suffices to point out that it is settled case-law that obtaining tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which, in principle, is contrary to a fundamental freedom (see Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 59).

51 It is clear from the foregoing analysis that a national provision such as that at issue in the main proceedings cannot be justified by overriding reasons in the public interest.

52 Consequently, the answer to the question referred is that Article 49 TFEU must be interpreted, in

circumstances such as those at issue in the main proceedings, as precluding legislation of a Member State which makes the grant of a reduction in capital tax conditional upon remaining liable to that tax for the next five tax years.

Costs

53 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 49 TFEU must be interpreted, in circumstances such as those at issue in the main proceedings, as precluding legislation of a Member State which makes the grant of a reduction in capital tax conditional upon remaining liable to that tax for the next five tax years.

[Signatures]

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* Language of the case: French.