JUDGMENT OF THE COURT (Third Chamber)

12 December 2013 *(1)

(Judicial protection – Principle of effectiveness – Principles of legal certainty and the protection of legitimate expectations – Restitution of sums paid but not due – Remedies – National legislation – Curtailment of the limitation period for the applicable remedies without notice and retroactively)

In Case C-362/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 25 July 2012, received at the Court on 30 July 2012, in the proceedings

Test Claimants in the Franked Investment Income Group Litigation

v

Commissioners of Inland Revenue,

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund (Rapporteur), A. Ó Caoimh, C. Toader and M. E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 June 2013,

after considering the observations submitted on behalf of:

– Test Claimants in the Franked Investment Income Group Litigation, by G. Aaronson QC, P. Freund and P. Farmer, Barristers, instructed by S. Whitehead, Solicitor,

– the United Kingdom Government, by H. Walker, acting as Agent, and by D. Ewart QC and K. Bacon, Barrister,

– the Spanish Government, by A. Rubio González, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 5 September 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principles of effectiveness, legal certainty and the protection of legitimate expectations.

2 The request has been made in proceedings between (i) the Test Claimants in the Franked Investment Income Group Litigation ('the Test Claimants') and (ii) the Commissioners of Inland Revenue ('the Commissioners') and the Commissioners for Her Majesty's Revenue and Customs, concerning legal remedies available to taxpayers for the recovery of sums paid but not due as regards taxes declared incompatible with the freedom of establishment and the free movement of capital.

Legal context

3 At the material time two 'common law' remedies were available under English law for claimants seeking restitution of corporation taxes levied in breach of European Union (EU) law.

4 The first remedy, recognised by the House of Lords in its decision of 20 July 1992 in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, ('the *Woolwich* cause of action'), is an action for the recovery of tax unlawfully levied.

5 Under section 5 of the Limitation Act 1980 ('the 1980 Act'), the limitation period for that action is six years from when the cause of action arose.

6 The second remedy, recognised in the House of Lords' decision of 29 October 1998 in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, ('the *Kleinwort Benson* cause of action'), permits the restitution of sums paid under a mistake of law.

7 Under section 32(1)(c) of the 1980 Act, the limitation period for this type of action is six years from the date on which the claimant discovered the mistake of law or could with reasonable diligence have discovered it.

8 From the late 1990s, certain provisions of the legislation concerning the taxation of United Kingdom-resident companies were challenged in relation to their compatibility with the freedom of establishment and the free movement of capital.

9 A reference was thus made to the Court for a preliminary ruling in the case which gave rise to the judgment of 8 March 2001 in Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727. In its judgment the Court held that certain aspects of the advance corporation tax ('ACT') regime, which applied in the United Kingdom from 1973 to 1999, were incompatible with those freedoms.

10 It was in the context of subsequent proceedings relating to the same tax provisions that the High Court of Justice of England and Wales, Chancery Division, in its judgment of 18 July 2003 in *Deutsche Morgan Grenfell Plc* v *Inland Revenue Commissioners* [2003] 4 All ER 645, held for the first time that the *Kleinwort Benson* cause of action could be relied on to seek recovery of tax paid under a mistake of law. Until that date, such a cause of action had not been available as against the tax authorities.

11 Thus, the High Court held that the limitation period applicable to that cause of action was the period laid down by section 32(1)(c) of the 1980 Act, namely six years from the date on which the claimant discovered the mistake of law or could with reasonable diligence have discovered it.

12 On 8 September 2003, the United Kingdom Government announced that it would be introducing

legislation relating to actions to recover tax where payments were made under a mistake of law. That proposal gave rise to section 320 of the Finance Act 2004, which was enacted on 24 June 2004 ('section 320').

13 Section 320 provides:

'(1) Section 32(1)(c) of the … [1980 Act] … (extended period for bringing an action in case of mistake) does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners …

This subsection has effect in relation to actions brought on or after 8 September 2003.'

14 By judgment of 4 February 2005, the Court of Appeal of England and Wales reversed the decision of the High Court in *Deutsche Morgan Grenfell Plc* v *Inland Revenue Commissioners*. The Court of Appeal's decision was in turn reversed by the House of Lords on 25 October 2006. The House of Lords reinstated the decision of the High Court and confirmed that, for the purpose of making a claim for recovery of tax paid but not due, taxpayers could have recourse to either the *Woolwich* cause of action, which is based on the collection of tax unlawfully demanded and is subject to a limitation period of six years from the date of payment of the tax, or the *Kleinwort Benson* cause of action, which is based on a mistake of law and is subject to a limitation period of six years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

15 Following that decision of the House of Lords on 25 October 2006, the United Kingdom Government applied to the Court for the re-opening of the procedure in the case which resulted in the judgment of 12 December 2006 (Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753) in order to obtain a limitation of the temporal effects of that judgment. On 6 December 2006 the Court refused that application.

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

16 This request for a preliminary ruling has been made in the context of a group action brought before the United Kingdom courts by the Test Claimants. It follows two previous references giving rise to the judgment in *Test Claimants in the FII Group Litigation* (Case C-446/04) and that of 13 November 2012 in Case C-35/11 *Test Claimants in the FII Group Litigation* [2012] ECR; those references concerned the possible incompatibility of the tax treatment of dividends paid to parent companies established in the United Kingdom by subsidiaries that were not established there with the fundamental freedoms laid down in the FEU Treaty, in particular the freedom of establishment provided for in Article 49 TFEU and the free movement of capital provided for in Article 63 TFEU.

17 The cases chosen by the Supreme Court of the United Kingdom as test cases for the purposes of this request for a preliminary ruling concern claims for recovery of ACT, paid but not due, brought by members of the Aegis group of companies ('Aegis'). The cases concern claims for recovery of payments that were made more than six years before Aegis issued its proceedings.

18 Consequent on the decision in *Metallgesellschaft and Others* and that of the High Court in *Deutsche Morgan Grenfell Plc* v *Inland Revenue Commissioners*, Aegis, on 8 September 2003, introduced a claim for restitution on the basis of the *Kleinwort Benson* cause of action in order to reclaim the ACT paid though not due over the period from 1973 to 1999.

19 Under section 32(1)(c) of the 1980 Act, the limitation period applicable to that action began to run from discovery of the mistake of law giving rise to the payment of the tax, in the present case, the

date of delivery of the judgment in *Metallgesellschaft and Others*, namely 8 March 2001.

20 The effect of section 320 is that the longer limitation period provided for in section 32(1)(c) of the 1980 Act does not apply to proceedings for the recovery of sums paid under a mistake of law when the action relates to a taxation matter under the care and management of the Commissioners. Section 320, which was enacted on 24 June 2004, entered into force retroactively on 8 September 2003, the date on which the proposal to enact that section was announced and on which Aegis issued its proceedings.

21 In its appeal before the referring court, Aegis, in essence, argued that it follows from the judgment in Case C-62/00 *Marks & Spencer* [2002] ECR I-6325 (‘*Marks & Spencer*’) that section 320 is contrary to the EU law principles of effectiveness, legal certainty and the protection of legitimate expectations.

22 According to Aegis, the breach of those principles consists in the fact that section 320, in excluding, without notice and retroactively, the limitation period for the *Kleinwort Benson* cause of action in relation to actions based on a mistake of law relating to a taxation matter under the care and management of the Commissioners, deprived it of the opportunity of making a claim which would otherwise have been made within the time-limits, thus rendering the exercise of the rights it derives under EU law excessively difficult or even impossible.

23 The Commissioners for Her Majesty’s Revenue and Customs contended, in essence, that EU law requires only that there be an effective remedy for enforcing rights under EU law. That requirement is, in their view, satisfied by the *Woolwich* cause of action. They submit that, provided that such a remedy remains available, it is immaterial that section 320 curtailed the extended limitation period applicable to an alternative domestic remedy so as to bring it in line with the limitation period for the *Woolwich* cause of action.

24 Since it entertained doubts on the compatibility of section 320 with EU law, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Where under the law of a Member State a taxpayer can choose between two alternative causes of action in order to claim restitution of taxes levied contrary to Articles 49 [TFEU] and 63 TFEU and one of those causes of action benefits from a longer limitation period, is it compatible with the principles of effectiveness, legal certainty and legitimate expectations for that Member State to enact legislation curtailing that longer limitation period without notice and retrospectively to the date of the public announcement of the proposed new legislation?

2. Does it make any difference to the answer to Question 1 that, at the moment when the taxpayer issued its claim using the cause of action which benefited from the longer limitation period, the availability of the cause of action under national law had only been recognised (i) recently and (ii) by a lower court and was not definitively confirmed by the highest judicial authority until later?’

Consideration of the questions referred

The first question

25 By its first question, the referring court asks, in essence, whether, in a situation in which, under national law, taxpayers have a choice between two possible causes of action as regards the recovery of tax levied in breach of EU law, one of which benefits from a longer limitation period, the

principles of effectiveness, legal certainty and the protection of legitimate expectations preclude national legislation curtailing that limitation period without notice and retroactively.

26 The United Kingdom Government submits in that regard that there is no requirement under EU law that additional remedies which may be provided for under national law for recovering overpaid tax should, looked at in isolation, satisfy the principles of effectiveness. In particular, it maintains that the principles stated in *Marks & Spencer* are not applicable to the case before the referring court. Exclusion of the limitation period for the *Kleinwort Benson* cause of action in respect of actions based on a mistake of law relating to a taxation matter did not in any way affect the limitation period applicable to the *Woolwich* cause of action, which, in itself, satisfies the principle of effectiveness and which Aegis was at all times entitled to use to recover tax levied in breach of EU law.

27 The United Kingdom Government adds that there was no certainty as to whether tax paid under a mistake of law could be recovered until the House of Lords gave its judgment of 25 October 2006 – that is to say, after Aegis had issued its proceedings. It submits that in such a situation reasonable persons could not have assumed that they would recover the overpaid tax, relying on the extended limitation period applicable to the *Kleinwort Benson* cause of action. There has thus been no breach of the principles of legal certainty or the protection of legitimate expectations.

28 The Commission, on the other hand, maintains that there is a strong similarity between the case in the main proceedings and the *Marks & Spencer* case. It submits that, even though the *Woolwich* cause of action, in itself, constitutes an effective remedy, that does not mean that the *Kleinwort Benson* cause of action may be abolished without notice and retroactively.

29 According to the Commission, even though there may have been some debate at the material time as to the availability of the *Kleinwort Benson* cause of action in tax matters, it was reasonable for taxpayers to consider that that action in case of mistake of law was general in its scope and consequently equally applicable in tax matters. The Commission therefore submits that section 320 is contrary to the principle of effectiveness as well as to the principles of legal certainty and protection of legitimate expectations. In order to comply with those principles, it would have been necessary to allow a reasonable period between the announcement of the proposal to enact section 320 and its entry into force in order to allow potential claimants to enforce their rights.

The principle of effectiveness

30 As a preliminary point, it should be recalled that, according to settled case-law, the right to a refund of taxes levied in a Member State in breach of EU law is the consequence and complement of the rights conferred on taxpayers by provisions of EU law as interpreted by the Court. A Member State is thus in principle required to repay taxes levied in breach of EU law (see Case C-591/10 *Littlewoods Retail and Others* [2012] ECR, paragraph 24 and the case-law cited).

31 In the absence of EU rules on the recovery of national taxes unduly levied, it is for the domestic legal system of each Member State, in accordance with the principle of the procedural autonomy of the Member States, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions at law for safeguarding the rights which taxpayers derive from EU law. The Member States none the less have responsibility for ensuring that those rights are effectively protected in each case (see Case C-93/12 *Agrokonsulting-04* [2013] ECR, paragraph 35 and the case-law cited).

32 The detailed procedural rules governing actions for safeguarding a taxpayer’s rights under EU law must thus be no less favourable than those governing similar domestic actions (principle of

equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, inter alia, Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 48 and the case law cited, and *Agrokonsulting-04*, paragraph 36).

33 As regards the latter principle, the Court has held that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned. Such time-limits are not liable to render impossible in practice or excessively difficult the exercise of rights conferred by EU law. However, in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance (*Marks & Spencer*, paragraphs 35 and 39 and the case-law cited).

34 As regards the recovery of domestic taxes unduly levied, the Court has already held that a time-limit of three years under national law, calculated from the date of the contested payment, appears reasonable (see Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19, and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 34). Thus, a limitation period of six years, such as that applied to the *Woolwich* cause of action, which starts to run on the date of payment of the tax concerned, appears, in itself, to be reasonable.

35 Nor does the principle of effectiveness present an absolute bar to the retroactive application of a new period for initiating proceedings that is shorter and, as the case may be, more restrictive for taxpayers than the period previously applicable, where such application concerns actions for the recovery of domestic taxes contrary to EU law which have not yet been commenced by the time the new period comes into force but which relate to sums paid whilst the old period was still applicable (*Grundig Italiana*, paragraph 35).

36 Given that the detailed rules governing the recovery of national taxes unduly levied are a matter for national law, the question whether such rules may apply retroactively is equally a matter for national law, provided that any such retroactive application does not contravene the principle of effectiveness (*Grundig Italiana*, paragraph 36).

37 However, as the Court held in paragraph 38 of *Marks & Spencer*, whilst national legislation reducing the period within which repayment of sums collected in breach of EU law may be sought is not incompatible with the principle of effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the previous legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.

38 It follows that national legislation curtailing, retroactively and without any transitional arrangements, the period within which repayment could be sought of sums collected in breach of EU law is incompatible with the principle of effectiveness (see, to that effect, *Marks & Spencer*, paragraph 47).

39 The fact that in the *Marks & Spencer* case the taxpayer had only one legal remedy, whilst in the case in the main proceedings the taxpayer has two such remedies, cannot, in circumstances such as those in issue before the referring court, lead to a different conclusion.

40 In the present case, it is appropriate to examine the rights conferred on taxpayers under national

law before the enactment of the legislative amendment in question and the consequences of that amendment for the exercise of the right of recovery conferred on them by EU law.

41 It is apparent from the documents before the Court that, until section 320 was enacted, it was open to taxpayers to introduce claims based on a mistake of law for the recovery of tax paid but not due, using the *Kleinwort Benson* cause of action, during a six-year period starting with discovery of the mistake giving rise to payment of the tax concerned. The enactment of section 320 had the effect of depriving them of that possibility, retroactively and without any transitional arrangements, since the section provides that the extended period for bringing an action in case of mistake of law does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners. Their claim for recovery of sums paid though not due could thus no longer cover any period other than 1997 to 1999.

42 Whilst the principle of effectiveness does not preclude national legislation curtailing the period in which claims may be brought for recovery of sums paid though not due, and whilst, as is evident from paragraph 34 of this judgment, a limitation period of six years which starts to run on the date of payment of the tax appears in itself to be reasonable, the new legislation must also, according to the case-law referred to in paragraph 37 of this judgment, provide for transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims which taxpayers were entitled to submit under the previous legislation.

43 The requirement for transitional arrangements is not satisfied by a national legislative provision such as that at issue in the main proceedings, which has the effect of curtailing the limitation period for actions to recover sums paid but not due so that, instead of six years from discovery of the mistake giving rise to payment of the tax, that period is six years from the date of payment of the tax, and which provides for its immediate application to all claims made after the date of its enactment as well as to claims made between that date and an earlier date, in the present case the date the proposal to adopt that provision was announced, which is also the date on which the provision took effect. Such legislation makes it impossible in practice to exercise a right previously available to taxpayers to recover tax paid but not due. It follows that national legislation such as that at issue in the main proceedings must be considered to be incompatible with the principle of effectiveness.

The principles of legal certainty and the protection of legitimate expectations

44 It should be recalled that, according to settled case-law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them (see, inter alia, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80). As has been observed in paragraph 33 of this judgment, limitation periods must be fixed in advance if they are to serve their purpose of ensuring legal certainty.

45 The Court has also held that the principle of the protection of legitimate expectations precludes a national legislative amendment which retroactively deprives a taxpayer of the right enjoyed prior to that amendment to obtain repayment of taxes collected in breach of EU law (see to that effect, *Marks & Spencer*, paragraph 46).

46 In the present case, as is apparent from paragraph 41 of this judgment, before the enactment of section 320, taxpayers, in order to claim repayment of tax paid but not due, were entitled to rely on the *Kleinwort Benson* cause of action before the national courts and could expect that the question as to whether or not their claims were well founded would be decided by those courts.

47 As a result of the enactment of section 320, however, they were deprived of that right retroactively and without any transitional arrangements. That provision thus brought about a change which adversely affected their situation without them being able to prepare for it.

48 It follows that such a change in the law infringes the principles of legal certainty and the protection of legitimate expectations.

49 In view of the foregoing considerations, the answer to the question referred is that in a situation in which, under national law, taxpayers have a choice between two possible causes of action as regards the recovery of tax levied in breach of EU law, one of which benefits from a longer limitation period, the principles of effectiveness, legal certainty and the protection of legitimate expectations preclude national legislation curtailing that limitation period without notice and retroactively.

The second question

50 By its second question the referring court asks, in essence, whether it makes any difference to the answer to the first question that, at the time when the taxpayer issued its claim, the availability of the cause of action affording the longer limitation period had been recognised only recently by a lower court and was not definitively confirmed by the highest judicial authority until later.

51 Such circumstances are not relevant. What matters is that, as the referring court has stated, at the material time a taxpayer had under national law a right to bring proceedings for recovery of sums paid but not due on the basis of that cause of action.

52 Consequently, the reply to the second question is that it makes no difference to the answer to the first question that, at the time when the taxpayer issued its claim, the availability of the cause of action affording the longer limitation period had been recognised only recently by a lower court and was not definitively confirmed by the highest judicial authority until later.

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 (Third Chamber) hereby rules:

1. **In a situation in which, under national law, taxpayers have a choice between two possible causes of action as regards the recovery of tax levied in breach of European Union law, one of which benefits from a longer limitation period, the principles of effectiveness, legal certainty and the protection of legitimate expectations preclude national legislation curtailing that limitation period without notice and retroactively.**

2. **It makes no difference to the answer to the first question that, at the time when the taxpayer issued its claim, the availability of the cause of action affording the longer limitation period had been recognised only recently by a lower court and was not definitively confirmed by the highest judicial authority until later.**

[Signatures]

1 Language of the case: English.