

## JUDGMENT OF THE COURT (First Chamber)

18 December 2014 (\*)

(Failure of a Member State to fulfil obligations — Recovery of taxes unduly paid under EU law — National legislation — Retroactive curtailment of the limitation period for the applicable remedies — Principle of effectiveness — Principle of the protection of legitimate expectations)

In Case C-640/13,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 4 December 2013,

**European Commission**, represented by R. Lyal and W. Roels, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**United Kingdom of Great Britain and Northern Ireland**, represented by J. Beeko, acting as Agent,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger, and F. Biltgen, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

### Judgment

- 1 By its application, the European Commission seeks a declaration from the Court that, by retroactively curtailing the right of taxpayers to recover tax which was levied contrary to European Union law, the United Kingdom of Great Britain and Northern Ireland has failed to comply with its obligations under Article 4(3) TEU.

#### Legal context

- 2 English law provides two common law remedies for the recovery of taxes which were levied contrary to EU law.

- 3 The first remedy, recognised by the House of Lords in its judgment 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.
- 4 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, namely the payment of the tax in question.
- 5 The second remedy, recognised in the House of Lords’ judgment 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.
- 6 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.
- 7 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 EU law, in particular with the freedom of establishment and the free movement of capital.
- 8 On a reference, the Court held, in *Metallgesellschaft and Others* (C-397/98 and C-410/98, EU:C:2001:134), that certain aspects of the advance corporation tax regime, which applied in the United Kingdom from 1973 to 1999, were incompatible with those freedoms.
- 9 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 proceedings based on the *Kleinwort Benson* cause of action could be brought against the tax authorities to seek recovery of tax paid under a mistake of law.
- 10 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.
- 11 On 8 September 2003, the United Kingdom Government announced that it would be introducing legislation intended to restrict the application of that limitation period in relation to proceedings brought on the basis of the *Kleinwort Benson* cause of action for the recovery of taxes paid under a mistake of law. That proposal gave rise to section 320 of the Finance Act 2004, enacted on 24 June 2004.
- 12 Section 320 provides:
- ‘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 of Inland Revenue.
- This subsection has effect in relation to actions brought on or after 8<sup>th</sup> September 2003.’
- 13 The adoption on 19 July 2007 of the Finance Act 2007 further amended, retroactively, the limitation period provided for in section 32(1)(c) of the 1980 Act with respect to proceedings brought on the basis of the *Kleinwort Benson* cause of action for the recovery of taxes paid under a mistake of law.
- 14 Section 107(1) of the Finance Act 2007 provides, in particular:

‘Section 32(1)(c) of the 1980 Act ... (extended period for bringing action in case of mistake) does not apply in relation to any action brought before 8<sup>th</sup> September 2003 for relief from the consequences of a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue.’

### **Pre-litigation procedure**

- 15 On 9 October 2009, the Commission sent a letter of formal notice to the United Kingdom in which it drew the United Kingdom’s attention to the incompatibility of section 107 of the Finance Act 2007 with Article 4(3) TEU, in that section 107 provides for the retroactive curtailment of the limitation period applicable to proceedings brought on the basis of the *Kleinwort Benson* cause of action for the refund of taxes levied in breach of EU law.
- 16 By letter of 23 April 2010, in response to that letter of formal notice, the United Kingdom disputed the incompatibility of that section with EU law.
- 17 On 1 October 2010, the Commission sent the United Kingdom a reasoned opinion in which it restated its position and invited that Member State to take the necessary measures within two months of receipt of that opinion.
- 18 The United Kingdom replied, by letter of 29 November 2010, informing the Commission that it disagreed with the allegation that it had failed to fulfil obligations.
- 19 By letter of 21 December 2012, however, the United Kingdom informed the Commission that the Supreme Court of the United Kingdom, in its judgment of 23 May 2012 in *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and another* [2012] UKSC 19, had unanimously ruled that section 107 of the Finance Act 2007 infringed EU law. In the same letter, the United Kingdom also acknowledged that section 107 infringed EU law and that the provision would be disapplied each time it proved to be incompatible.
- 20 The Commission was not satisfied by those replies and brought the present action before the Court of Justice.

### **The action**

#### *Arguments of the parties*

- 21 The Commission submits that the United Kingdom, by adopting section 107 of the Finance Act 2007, has failed to fulfil its obligations under Article 4(3) TEU. It states that the provision is incompatible with the principles of effectiveness and of the protection of legitimate expectations, inasmuch as it retroactively restricts the right of taxpayers to recover taxes levied by tax authorities in breach of EU law.
- 22 First of all, in relation to the principle of effectiveness, the Commission notes that, in the judgment in *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 38), the Court held, in essence, that the principle precludes national legislation reducing the period for seeking repayment of sums collected in breach of EU law where the new time-limit is not reasonable and where the legislation does not contain any transitional arrangements giving individuals adequate time, after the legislation has been adopted, to lodge claims for repayment which they were entitled to submit under the previous legislation.

- 23 The considerations underpinning that judgment are a fortiori applicable in the present case. If national legislation which denies individuals the possibility of seeking redress which was available to them until the time of the adoption of that legislation is incompatible with the principle of effectiveness, a provision, such as section 107 of the Finance Act 2007, which retroactively denies individuals the right to pursue an action which they have already commenced before the courts is all the more incompatible.
- 24 Consequently, the Commission submits that, even though English law provides for another remedy in the form of the *Woolwich* cause of action, it is not permissible for the right of action based on the *Kleinwort Benson* cause of action not only to be abolished without notice, but also to be withdrawn from persons who have already brought proceedings on that basis.
- 25 Secondly, with respect to the principle of the protection of legitimate expectations, the Commission submits that that principle is not limited to the right to obtain a given result, but also includes the right to be protected by law and to have access to the judicial system.
- 26 It follows that a provision such as section 107 of the Finance Act 2007 infringes the principle of the protection of legitimate expectations of taxpayers who have exercised the *Kleinwort Benson* cause of action by bringing an action before the courts for the recovery of unduly paid taxes. Those taxpayers are entitled to expect that their action is not retroactively declared inadmissible and that the courts before which it was brought will rule on its merits.
- 27 The United Kingdom does not dispute the infringement complained of. However, it states that section 107 of the Finance Act 2007 should soon be amended, and that the amendment will render that section inapplicable to proceedings which have already been brought in cases concerning taxes levied in breach of EU law.

#### *Findings of the Court*

- 28 The Commission complains that the United Kingdom infringed Article 4(3) TEU on account of the incompatibility of section 107 of the Finance Act 2007 with the principles of effectiveness and of the protection of legitimate expectations.
- 29 As is apparent from the file submitted to the Court, that section retroactively curtailed, without prior notice or transitional arrangements, the limitation period applicable to proceedings brought by taxpayers on the basis of the *Kleinwort Benson* cause of action for the repayment of taxes levied in breach of EU law by British tax authorities. That curtailment is part of national law which offers those taxpayers another remedy for repayment of overpaid tax in the form of the *Woolwich* cause of action, to which a shorter limitation period applies.
- 30 In that regard, in making a finding on the infringement complained of, it should first be borne in mind that 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 individuals by the provisions of EU law. A Member State is thus in principle required to repay taxes levied in breach of EU law (see judgment in *Test Claimants in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:834, paragraph 30 and the case-law cited).
- 31 In the first place, with respect to the infringement of the principle of effectiveness, it should be recalled that, 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 lay down the detailed procedural rules governing actions at law for safeguarding the rights which taxpayers derive from EU law (see, to that effect, judgments in

*Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 35, and *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraph 31).

- 32 In that context, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, the principle of effectiveness requires such procedural rules not to render in practice impossible or excessively difficult the exercise of rights conferred by EU law (see, to that effect, judgments in *Agrokonsulting-04*, EU:C:2013:432, paragraph 36, and *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraph 32).
- 33 With respect to the present infringement proceedings, it must be borne in mind that, according to the settled case-law of the Court, that principle prohibits the retroactive application of a new, shorter, and, as the case may be, more restrictive limitation period than that previously applicable, where its application concerns actions for the recovery of domestic taxes contrary to EU law which have already been commenced at the time the new period comes into force (see, to that effect, judgment in *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraph 35 and the case-law cited).
- 34 Moreover, that principle precludes national legislation which curtails, retroactively and without any transitional arrangements, the period within which repayment of the sums collected in breach of EU law could be sought (see judgment in *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraph 38).
- 35 It follows that the principle of effectiveness precludes a provision, such as section 107 of the Finance Act 2007, in so far as that provision curtails, retroactively and without notice or transitional arrangements, the limitation period relating to proceedings which have already been brought before national courts in the form of the *Kleinwort Benson* cause of action.
- 36 The fact that taxpayers have, under national law, another remedy enabling them to seek the repayment of taxes levied in breach of EU law, in the form of the *Woolwich* cause of action, cannot call into question that finding (see, to that effect, judgment in *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraph 39).
- 37 Section 107 of the Finance Act 2007, de facto, denies taxpayers the possibility of relying on the *Kleinwort Benson* cause of action, in relation to which a longer limitation period applies than that relating to the *Woolwich* cause of action, namely six years from the date of discovery of the mistake on which the payment was based, rather than from the date the undue taxes were paid. That section makes it impossible in practice for taxpayers to exercise the right to a refund of taxes levied in breach of EU law which was available to them prior to the adoption of that section and which they had already asserted by that date (see, to that effect, judgment in *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraph 43).
- 38 In the second place, with respect to the principle of the protection of legitimate expectations, the Court has held that that principle also precludes national legislation which retroactively deprives a taxpayer of the right enjoyed prior to the adoption of that legislation to obtain the repayment of taxes levied in breach of EU law (see judgment in *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraph 45 and the case-law cited). As noted by the Commission in its application, in accordance with that principle, a taxpayer who has brought, by the time the new legislation is adopted, an action seeking such a refund is entitled to expect that his action will not be declared inadmissible as a result of the retroactive application of that legislation and that the courts before which proceedings were brought will decide on the substance of that action.

- 39 In the present case, it is not disputed that, by retroactively curtailing the limitation period, section 107 of the Finance Act 2007 adversely affected the situation of taxpayers who had already brought proceedings in the form of the *Kleinwort Benson* cause of action for the repayment of the taxes levied in breach of EU law. Those taxpayers were entitled to expect that the question as to whether or not their actions were well founded would be decided by the national courts before which proceedings were brought (see, to that effect, judgment in *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paragraphs 46 and 47).
- 40 It follows that section 107 of the act must be deemed incompatible not just with the principle of effectiveness, but also with the principle of the protection of legitimate expectations of taxpayers, so far as concerns the obligation under EU law to guarantee taxpayers the right to a refund of taxes paid in breach of that law, an obligation which the United Kingdom is required to fulfil by virtue of Article 4(3) TEU.
- 41 That said, it should be noted that the United Kingdom, which does not dispute the infringement complained of, nonetheless points out that an amendment of section 107 of that act was contemplated.
- 42 In that regard, it is sufficient to note that the question whether a Member State has failed to fulfil 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 (see judgment in *Commission v Greece*, C-351/13, EU:C:2014:2150, paragraph 20 and the case-law cited).
- 43 It is not disputed that, on the date of expiry of the period prescribed in the reasoned opinion, section 107 of the Finance Act 2007 was still in force.
- 44 Consequently, the argument of the United Kingdom relating to a forthcoming amendment of that section must be rejected as irrelevant and the action brought by the Commission must be considered to be well founded.
- 45 In the light of the foregoing, it must accordingly be held that, by adopting a provision, such as section 107 of the Finance Act 2007, which curtailed, retroactively and without notice or transitional arrangements, the right of taxpayers to recover taxes levied in breach of EU law, the United Kingdom has failed to comply with its obligations under Article 4(3) TEU.

### Costs

- 46 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Declares that by adopting a provision, such as section 107 of the Finance Act 2007, which curtailed, retroactively and without notice or transitional arrangements, the right of taxpayers to recover taxes levied in breach of EU law the United Kingdom of Great Britain and Northern Ireland has failed to comply with its obligations under Article 4(3) TEU;**

**2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]

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\* Language of the case: English.